THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx North Gall.

COUNCIL OF LAW REPORTING

COUNCIL OF LAW REPORTING.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.
Vice-Chairman—W. T. S. Daniel, Esq., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir R. P. Collier, Knt., M.P.
The Solicitor-General, Sir J. D. Coleridge, Knt., M.P.
The Queen's Advocate-General, Sir Travers Twiss, Knt.

ELECTED MEMBERS.

Mr. Serjeant O'Brien Mr. Serjeant Pulling	Serjeants' Inn.
Sir Roundell Palmer, Knt., M.P., Q.C. W. T. S. Daniel, Esq., Q.C.	Lincoln's Inn.
William Forsyth, Esq., Q.C. H. Warwick Cole, Esq., Q.C.	Inner Temple.
T. W. Greene, Esq., Q.C. John Gray, Esq., Q.C.	Middle Temple.
John A. Russell, Esq., Q.C. James Barstow, Esq.	Gray's Inn.
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. Cookson, Esq. (Firm—Messrs. Cookson, Wainewright, & Co.), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

THE

LAW REPORTS.

Chancery Appeal Cases,

INCLUDING

Bankruptcy and Lunacy Cases,

BEFORE

THE LORD CHANCELLOR,

AND THE

COURT OF APPEAL IN CHANCERY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. IV.

1868-9.—XXXII & XXXIII VICTORIÆ.

LONDON:

PRINTED FOR THE COUNCIL OF LAW REPORTING

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14 CHARING CROSS.

PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

1869.

BIBL.
LONDIN.
UNIV.

NAMES OF REPORTERS.

LORD CHANCELLOR AND LORDS JUSTICES . .	CHARLES MARETT, H. CADMAN JONES, MARTIN WARE,	*Barristers-at-Law.*
MASTER OF THE ROLLS .	J. H. FORDHAM, E. WINGFIELD, JAMES STIRLING,	*Barristers-at-Law.*
V.-C. STUART	J. W. DE LONGUEVILLE GIFFARD, T. F. MORSE,	*Barristers-at-Law.*
V.-C. MALINS	T. W. GUNNING, J. J. SMALE,	*Barristers-at-Law.*
V.-C. GIFFARD . . . . V.-C. JAMES	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1868-1869_4

Lord Cairns,
Lord Hatherley, } *Lord Chancellors.*

Lord Romilly, *Master of the Rolls.*

Sir William Page Wood,
Sir Charles Jasper Selwyn,
Sir George Markham Giffard, } *Lords Justices.*

Sir John Stuart,
Sir Richard Malins,
Sir George Markham Giffard,
Sir William Milbourne James, } *Vice-Chancellors.*

Sir John Burgess Karslake,
Sir Robert Porrett Collier, } *Attorneys-General.*

Sir Richard Baggallay,
Sir John Duke Coleridge, } *Solicitors-General.*

ERRATA.

[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page	*Line*	*For*	*Read*
127	— 13	be	it.
127	— 12, dele "to."		
483	— 10	*Carpenter* v *Weiss*	*Carpenter's and Weiss's Case.*
626	— 3	Appellants	trustees.
626	— 1	trustees	Appellants.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aberaman Ironworks, *In re.* Peek's Case – – –	532
——— *v.* Wickens	101
Accidental and Marine Insurance Corporation, *In re.* Bridger's Case and Neill's Case – –	266
Adams, Brown *v.* – – –	764
Aldborough Hotel Company, *In re.* Simpson's Case – –	184
Allen *v.* Jarvis – – –	616
Alliance Bank, *Ex parte. In re* General Rolling Stock Co. –	423
Alston, *Ex parte. In re* Holland	168
Alton *v.* Harrison – – –	622
Andrew, *In re. Ex parte* Rippon	639
Anglo-Greek Steam Navigation and Trading Company, *In re.* Carralli and Haggard's Claim	174
Asiatic Banking Corporation, *In re.* Royal Bank of India's Case	252
Astbury, *Ex parte. In re* Richards	630
Attorney-General *v.* Cambridge Consumers Gas Company –	71
——— *v.* Colney Hatch Lunatic Asylum – – –	146
——— *v.* Ely, Haddenham, and Sutton Railway Company – – – –	194
——— *v.* Sidney Sussex College – – –	722
Auster *v.* Haines – – –	445

B.

	PAGE
Barnard *v.* Ford. Carrick *v.* Ford	247
Barnett, *Ex parte. In re* Taylor	68
———, *Ex parte. In re* Taylor (2)	352
Barrington, Inchbald *v.* – –	388
Bates and Redgate, *Ex parte* –	577
Beauchamp (Earl) *v.* Winn –	562
Beaumont *v.* Oliveira – –	309
Beioley *v.* Carter – – –	230
Bell *v.* Blyth – – – –	136
——, Wilson *v.* – – –	581
Biddulph, *In re. Ex parte* Norris	280
Bingham, Pardo *v.* – – –	735
Blackford *v.* Davis – – –	304
Blakely Ordnance Company, *In re.* Lumsden's Case – –	31
Blakeway, Steward *v.* – –	603
Blyth, Bell *v.* – – –	136
Brady, Craven *v.* – – –	296
Bridger's Case. *In re* Accidental and Marine Insurance Corporation – – – – –	266
Bright, Moxon *v.* – – –	292
Bristowe, Coles *v.* – – –	3
Brown *v.* Adams – – –	764

C.

	PAGE
Cambrian Steam Packet Company, *Ex parte. In re* Trent and Humber Company – –	112

PAGE

Cambridge Consumers Gas Company, Attorney-General *v.* – 71
Capps *v.* Capps – – – 1
Carnegie, Hope *v.* – – – 264
Carralli and Haggard's Claim. *In re* Anglo-Greek Steam Navigation and Trading Company 174
Carrick *v.* Ford. Barnard *v.* Ford 247
Carter, Beioley *v.* – – – 230
Catt *v.* Tourle – – – 654
Chambers, Midland Banking Company *v.* – – – 398
Charlton *v.* Earl of Durham – 433
Chichester *v.* Marquis of Donegal 416
China Steamship and Labuan Coal Company, *In re.* Drummond's Case – – – 772
Clark, *In re.* Cumberland *v.* Clark 412
——, Cumberland *v.* *In re* Clark 412
——, Herring *v.* – – – 167
Clinch *v.* Financial Corporation 117
Cocq *v.* Hunasgeria Coffee Company – – – – – 415
Coles *v.* Bristowe – – – 3
Colney Hatch Lunatic Asylum, Attorney-General *v.* – – 146
Cork and Youghal Railway Company, *In re* – – – 748
Cox, Horsley *v.* – – – 92
Craven *v.* Brady – – – 296
Crawley's Case. *In re* Peruvian Railways Company – – 322
Crompe, *In re* – – – 653
Cruse *v.* Paine – – – 441
Cumberland *v.* Clark. *In re* Clark 412

D.

Dare Valley Railway Company, *In re* – – – – – 554
Davis, Blackford *v.* – – 304
Deacon, *Ex parte.* *In re* Deacon 87
Donegal (Marquis of), Chichester *v.* – – – – – 416
Dowlen, Taylor *v.* – – – 697
Drummond's Case. *In re* China Steamship and Labuan Coal Company – – – – 772
Durham (Earl of) Charlton *v.* – 433

E.

East of England Banking Company, *In re* – – – 14
Egremont *v.* Thompson – – 448
Egyptian Commercial and Trading Company, *Ex parte.* *In re* Kelson – – – – 125
Elderfield, Matterson *v.* – – 207
Ely, Haddenham, and Sutton Railway Company, Attorney-General *v.* – – – – 194
English and American Bank, *Ex parte.* *In re* Fraser, Trenholm, & Co. – – – – 49
Estates Investment Company, *In re.* Pawle's Case – – 497

F.

Financial Corporation, Clinch *v.* 117
Ford, Barnard *v.* – – – 247
——, Carrick *v.* – – – 247
Foy, Sharpe *v.* – – – 35
Fraser, Trenholm, & Co., *In re.* *Ex parte* English and American Bank – – – – 49
Fyfe's Case. *In re* Joint Stock Discount Company – – 768

G.

Gayford *v.* Moffatt – – – 133
Gear, Mackenzie *v.* – – – 2, n.
General Estates Company, *In re.* Hastie's Case – – – 274
General Rolling Stock Company, *In re.* *Ex parte* Alliance Bank 423
Gibson, *Ex parte.* *In re* Smith, Knight, & Co. – – – 662
Gouldwell, *In re.* *Ex parte* Squire 47
Green *v.* Wynn – – – 204
Griffin *v.* Morgan – – – 351
Gurney, Overend, Gurney, & Co. *v.* – – – – 701

H.

Haines, Auster *v.* – – – 445
Hallett, Tooth *v.* – – – 242
Hare's Case. *In re* London and County General Agency Association – – – – 503
Harrison, Alton *v.* – – – 622
——, Poyser *v.* – – 622
Hastie's Case. *In re* General Estates Company – – 274

PAGE

Hawkins *v.* Maltby – – – 200
Heard *v.* Pilley – – – 548
Herrick, White *v.* – – – 345
Herring *v.* Clark – – – 167
Hicks *v.* Powell – – – 741
Hill's Case. *In re* Joint Stock Discount Company – 769, n
Hoffmann *v.* Postill – – 673
Holland, *In re. Ex parte* Alston 168
——— *v.* Holland – – – 449
Hope *v.* Carnegie – – – 264
Horsley and Knighton's Patent, *In re* – – – – – 784
——— *v.* Cox – – – 92
Humber Ironworks and Shipbuilding Company, *In re.* Warrant Finance Company's Case 643
Hunasgeria Coffee Company, Cocq *v.* – – – – 415

I.

Inchbald *v.* Barrington – – 388
——— *v.* Robinson – – 388

J.

Jarvis, Allen *v.* – – – 616
Joint Stock Discount Company, *In re.* Fyfe's Case – – 768
———————, *In re.* Hill's Case – – 769, n

K.

Keates *v.* Lyon – – – 218
Kelson, *In re. Ex parte* Egyptian Commercial and Trading Co. 125

L.

Lamb *v.* North London Railway Company – – – – 522
Land Credit Company of Ireland, *In re. Ex parte* Overend, Gurney, & Co. – – – – 460
Langton *v.* Waite – – – 402
Lee, a Solicitor, *In re. Ex parte* Neville – – – – 43
Lloyd's Banking Company, *Ex parte. In re* Richards – – 630
Lockett *v.* Lockett – – – 336
London and County General Agency Association, *In re.* Hare's Case – – – 503
London and Northern Insurance Corporation, *In re.* Stace and Worth's Case – – – 682
London Marine Insurance Association, *In re.* Smith's Case – 611
Lumsden's Case. *In re* Blakely Ordnance Company – – 31
Lush's Trusts, *In re* – – 591
Lyon, Keates *v.* – – – 218

M.

Mackenzie *v.* Gear – – – 2, n
Maltby, Hawkins *v.* – – 200
Manby *v.* Robinson – – – 347
———, Webster *v.* – – – 372
Marshall, Turquand *v.* – – 376
Martin *v.* Powning – – – 356
Matterson *v.* Elderfield – – 207
Mercantile Trading Company, *In re.* Stringer's Case – – 475
Midland Banking Company *v.* Chambers – – – – 398
Mills *v.* Trumper – – – 320
Moffatt, Gayford *v.* – – – 133
Morgan, Griffin *v.* – – – 351
Moxon *v.* Bright – – – 292

N.

National Bank of England, *Ex parte. In re* Van Wart – 63
Neill's Case. *In re* Accidental and Marine Insurance Corporation – – – – 266
Neville, *Ex parte. In re* Lee, a Solicitor – – – – 43
Newton *v.* Newton – – – 143
Norris, *Ex parte. In re* Biddulph 280
North London Railway Company, Lamb *v.* – – – 522

O.

Oliveira, Beaumont *v.* – – 309
Osenton, *Ex parte. In re* Prior – 690
Overend, Gurney, & Co., *Ex parte. In re* Land Credit Company of Ireland – – – – 460

PAGE

Overend, Gurney, & Co. *v.* Gurney 701
Owen, *In re* – – – – 782

P.

Packham, Pickett *v.* – – 190
Paine and Layton, *Ex parte. In re* South Essex Estuary and Reclamation Company – – 215
Paine, Cruse *v.* – – – 441
Pardo *v.* Bingham – – – 735
Pawle's Case. *In re* Estates Investment Company – – 497
Peek's Case. *In re* Aberaman Ironworks – – – – 532
Pentelow's Case. *In re* Warren's Blacking Company – – 178
Peruvian Railways Company, *In re.* Crawley's Case – – 322
———————, *In re.* Robinson's Case – – 322
———————, *In re.* Wallis's Case – 325, n.
Petty *v.* Willson – – – 574
Phillips, *In re* – – – 629
Pickering, *Ex parte. In re* Pickering – – – – – 58
Pickett *v.* Packham – – – 190
Pilley, Heard *v.* – – – 548
Postill, Hoffmann *v.* – – 673
Powell, Hicks *v.* – – – 741
Powning, Martin *v.* – – – 356
Poyser *v.* Harrison – – – 622
Prior, *In re. Ex parte* Osenton – 690
Pulbrook, *Ex parte. In re* Union Cement and Brick Company – 627

R.

Renshaw's Trusts, *In re* – – 783
Richards, *In re. Ex parte* Astbury. *Ex parte* Lloyd's Banking Company – – – 630
Rippon, *Ex parte. In re* Andrew 639
Roberts' Trust, *In re* – – 561
Robinson, Inchbald *v.* – – 388
———, Manby *v.* – – 347
Robinson's Case. *In re* Peruvian Railways Company – – 322
Rose, *Ex parte. In re* Rose – 648
Royal Bank of India's Case. *In re* Asiatic Banking Corporation 252

PAGE

S.

Sharpe *v.* Foy – – – 35
Sidney Sussex College, Attorney-General *v.* – – – – 722
Simpson's Case. *In re* Aldborough Hotel Company – – – 184
Smith, Knight, & Co., *In re* – 421
———————— *Ex parte* Gibson – – – 662
————————, *In re.* Weston's Case – – – 20
———, Whitney *v.* – – – 513
Smith's Case. *In re* London Marine Insurance Association 611
South Essex Estuary and Reclamation Company, *In re. Ex parte* Paine and Layton – 215
Spirett *v.* Willows – – – 407
Springett, White *v.* – – 300
Squire, *Ex parte. In re* Gouldwell 47
Stace and Worth's Case. *In re* London and Northern Insurance Corporation – – – – 682
Steward *v.* Blakeway – – 603
Stringer's Case. *In re* Mercantile Trading Company – – 475

T.

Tate, Withington *v.* – – 288
Taylor, *In re. Ex parte* Barnett 68
———————— (2) 352
——— *v.* Dowlen – – – 697
Tennant *v.* Trenchard – – 537
Thompson, Egremont *v.* – – 448
Tooth *v.* Hallett – – – 242
Tourle, Catt *v.* – – – 654
Trenchard, Tennant *v.* – – 537
Trent and Humber Company, *In re. Ex parte* Cambrian Steam Packet Company – – – 112
Trumper, Mills *v.* – – – 320
Turquand *v.* Marshall – – 376

U.

Union Cement and Brick Company, *In re. Ex parte* Pulbrook 627

PAGE

V.

Van Wart, *In re*. *Ex parte* National Bank of England – 63

W.

Waite, Langton *v.* – – – 402
Wallis's Case. *In re* Peruvian Railways Company – 325, n.
Warrant Finance Company's Case. *In re* Humber Ironworks and Shipbuilding Co. – 643
Warren's Blacking Company, *In re*. Pentelow's Case – – 178
Webster *v.* Manby – – – 372
Weston's Case. *In re* Smith, Knight, & Co. – – – 20
White *v.* Herrick – – – 345
——— *v.* Springett – – – 300
Whitney *v.* Smith – – – 513
Wickens, Aberaman Ironworks *v.* 101
Wilkinson, *In re* – – – 587
Willows, Spirett *v.* – – – 407
Willson, Petty *v.* – – – 574
Wilson *v.* Bell – – – 581
Winn, Earl Beauchamp *v.* – 562
Withington *v.* Tate – – 288
Wynn, Green *v.* – – – 204

TABLE OF CASES CITED.

A.

		PAGE
Abraham *v.* Alman	1 Russ. 509	583
Acton *v.* Acton	1 Mer. 178	313
Adams *v.* Fisher	3 My. & Cr. 526	339
Addinell's Case	Law Rep. 1 Eq. 225	181
Adey *v.* Arnold	2 D. M. & G. 432; 16 Jur. 1123	457
Alabaster's Case	Law Rep. 7 Eq. 273	687
Alexander *v.* Mackenzie	6 C. B. 766	465
Allen *v.* Knight	5 Hare, 272	144
Alves *v.* Hodgson	7 T. R. 241	745
Angell *v.* Davis	4 My. & Cr. 360	265, 697
Anglo-Italian Bank and De Rosaz, In re	Law Rep. 2 Q. B. 452	558
Anon.	1 P. Wms. 495	283
——	19 L. T. (N. S.) 73	693
Athenæum Life Assurance Society *v.* Pooley	3 De G. & J. 294	104
Attwood *v.* Munnings	7 B. & C. 278	468
—— *v.* Small	6 Cl. & F. 232	104
Attorney-General *v.* Caius College	2 Keen, 150	727
—— *v.* Catherine Hall, Cambridge	Jac. 381	727
—— *v.* Conservators of the Thames	1 H. & M. 1	152
—— *v.* Corporation of Avon	11 W. R. 1050	76
—— *v.* Corporation of Rochester	5 D. M. & G. 797	727
—— *v.* Council of Borough of Birmingham	4 K. & J. 528	155
—— *v.* Eastlake	11 Hare, 205	314
—— *v.* Heelis	2 S. & S. 67	314
—— *v.* Mayor of Bristol	2 Jac. & W. 294	727
—— *v.* Mayor of Dublin	1 Bli. (N. S.) 312	314
—— *v.* Metropolitan Board of Works	1 H. & M. 298	152
—— *v.* Munro	2 De G. & Sm. 122	541
—— *v.* Pearson	7 Sim. 290	727
—— *v.* Proprietors of Bradford Canal	Law Rep. 2 Eq. 71	151
—— *v.* Sheffield Gas Consumers' Company	3 D. M. & G. 304	78

		PAGE
Attorney-General *v.* Smythies	2 Russ. & My. 717	727
——— *v.* United Kingdom Telegraph Company	30 Beav. 287	79
——— *v.* Wilson	Cr. & P. 1	379
Austen *v.* Halsey	2 S. & S. 123	346
Avery *v.* Langford	Kay, 663	656

B.

Backwell's Case	1 Vern. 152	65
Baillie *v.* McKewan	35 Beav. 177	144
Bain *v.* Whitehaven Railway Company	3 H. L. C. 1	744
Banfield, Ex parte	Law Rep. 1 Ch. 154	65, 692
Bank of England Case	3 D. F. & J. 645	607
Bank of Gibraltar and Malta, In re	Law Rep. 1 Ch. 69	379
Bargate *v.* Shortridge	5 H. L. C. 297	474
Barnard *v.* Ford	Law Rep. 4 Ch. 247	597
Barned's Banking Company, In re	Law Rep. 3 Ch. 105	257
Barnett, Ex parte	Law Rep. 4 Ch. 68	354
Barrett, Ex parte	2 Dr. & Sm. 415	180
Barrow *v.* Barrow	4 K. & J. 409	595
Barry *v.* Croskey	2 J. & H. 1	381
Bartlett *v.* Pickersgill	4 East. 577, n.	552
Bates *v.* Duke of Beaufort	8 Jur. (N. S.) 270	637
Beardmore *v.* Gregory	2 H. & M. 491	77
Beeching *v.* Gower	Holt, N. P. (C.P.) 313	17
Belhaven's (Lord) Case	3 D. J. & S. 41	508
Bell *v.* Bird	Law Rep. 6 Eq. 635	364
Bellamy *v.* Sabine	2 Ph. 425	76
Benbow *v.* Townsend	1 My. & K. 506	144
Bennett *v.* Hamill	2 Sch. & Lef. 566	238
——— *v.* Powell	3 Drew. 326	95
Benson *v.* Benson	1 P. Wms. 130	455
——— *v.* Hadfield	4 Hare, 32	667
——— *v.* Heathorn	1 Y. & C. Ch. 326	517
Beresford's Case	3 De G. & Sm. 175; 2 Mac. & G. 197	269
Beresford (Lady) *v.* Driver	14 Beav. 387	419
Biddle, In re	23 L. J. (Ch.) 23	629
Biddles *v.* Jackson	26 Beav. 282	346
Bignold *v.* Springfield	7 Cl. & F. 71	785
Bingham *v.* Bingham	1 Ves. Sen. 126	565
Bird *v.* Heath	6 Hare, 236	404
Blakely Ordnance Company, In re	Law Rep. 3 Ch. 154	466
Bloye's Trust, In re	1 Mac. & G. 488; 3 H. L. C. 607	546
Bolland *v.* Nash	8 B. & C. 105	176
Bostock *v.* North Staffordshire Railway Company	5 De G. & Sm. 584	393
Boulton *v.* Crowther	2 B. & C. 703	159
Boursot *v.* Savage	Law Rep. 2 Eq. 134	438
Bovey *v* Tracey	2 Eq. Cas. Abr. 163	379
Bowen *v.* Evans	1 J. & Lat. 178	238
Bower *v.* Marris	Cr. & Ph. 351	644
Bowes *v.* Howe	5 Taunt. 30	17
Boyce, In re	12 W. R. 1259	782
Bramble *v.* Moss	Law Rep. 3 C. P. 458	65

		PAGE
Broadbent *v.* Barlow	3 D. F. & J. 570	172
——— *v.* Imperial Gas Company	7 D. M. & G. 461	79
Bromley *v.* Williams	32 Beav. 177	613
Brookfield *v.* Bradley	2 S. & S. 64	404
Brown *v.* Candler	9 L. J. (Ch.) 212	321
——— *v.* Cole	14 Sim. 427	404
Brickwood *v.* Miller	3 Mer. 279	130
Bristow *v.* Whitmore	9 H. L. C. 391	246
Bullock *v.* Downes	9 H. L. C. 1	303
Burdin's Will, In re	7 W. R. 711; on app. 28 L. J. (Ch.) 840	235
Burrough *v.* Moss	10 B. & C. 558	176

C.

Cameron's Coalbrook, &c., Railway Company, In re	25 Beav. 1	216, 628
Cannot, Re	8 L. T. (N. S.) 291	70
Canwell, Ex parte	12 W. R. 698; 33 L. J. (Bkcy.) 26	278
Capper's Case	Law Rep. 3 Ch. 458	34
Capps *v.* Capps	Law Rep. 4 Ch. 1	446
Cardiff Coal and Coke Company, In re	11 W. R. 1007	481
Cardiff Preserved Coal and Coke Company *v.* Norton	Law Rep. 2 Ch. 405	481
Carne *v.* Long	2 D. F. & J. 75	315
Carpenter's and Weiss's Case	5 De G. & Sm. 402	483
Case of Forests	6 Rep. part 12, p. 222	565
Cattley *v.* Arnold	1 J. & H. 651	321
Chadwick *v.* Turner	Law Rep. 1 Ch. 310	744
Challett *v.* Hoffman	7 E. & B. 686	785
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	754
Chappell *v.* Purday	2 Ph. 227	265
Chapple's Case	5 De G. & Sm. 400	278
Charitable Corporation *v.* Sutton	2 Atk. 400	379, 711
Chedworth (Lord) *v.* Edwards	8 Ves. 46	766
Chelmsford Grammar School, In re	1 K. & J. 543	728
Child *v.* Douglas	Kay, 560	224
Chinnock's Case	Joh. 714	23
Christ's Hospital *v.* Grainger	1 Mac. & G. 460	728
Clark *v.* Lord Rivers	Law Rep. 5 Eq. 91	549
—— *v.* Mullick	3 Moo. P. C. 352	744
Clayton's Case	1 Mer. 572	765
Clegg *v.* Edmondson	3 Jur. (N. S.) 299	340
Cleland, Ex parte	Law Rep. 2 Ch. 808	175
Clifford *v.* Brooke	13 Ves. 131	381
Clinch *v.* Financial Corporation	Law Rep. 4 Ch. 117	687
Clive *v.* Carew	1 J. & H. 199	595
Clowes, Ex parte	2 Bro. C. C. 595	667
Cocking *v.* Pratt	1 Ves. Sen. 400, Suppt. 176	565
Cockrell *v.* Sparke	9 Jur. (N. S.) 307	737
Coles *v.* Bristowe	Law Rep. 4 Ch. 3	201, 259, 441
—— *v.* Sims	Kay, 56	223
Collier *v.* McBean	Law Rep. 1 Ch. 81	236
Collins *v.* Jones	10 B. & C. 777	175
——— *v.* Plumb	16 Ves. 454	655

		PAGE
Colyer *v.* Finch	5 H. L. C. 905	144
Commercial Bank Corporation of India and the East, In re	16 W. R. 958	666
Commercial Bank of Canada *v.* Great Western Railway of Canada	3 Moo. P. C. (N. S.) 295	465
Connolly *v.* Farrell	8 Beav. 347	584
Contract Corporation, Ex parte. In re Barned's Banking Company	Law Rep. 3 Ch. 105	466
Cooke *v.* Forbes	Law Rep. 5 Eq. 166	76
Cooper *v.* Ewart	2 Ph. 362	44
—— *v.* Phibbs	Law Rep. 2 H. L. 149	565
Cornhill *v.* Hudson	8 E. & B. 429	737
Corry *v.* Londonderry and Enniskillen Railway Company	29 Beav. 263	481
Cory *v.* Thames Ironworks Company	Law Rep. 3 Q. B. 181	115
Cother *v.* Midland Railway Company	2 Ph. 469	526
Courtenay *v.* Williams	3 Hare, 539	744
Courtney *v.* Taylor	7 Scott, N. R. 749; 6 Man. & G. 51	457
Cowell *v.* Gatcombe	27 Beav. 568	438
Cowen, Ex parte	Law Rep. 2 Ch. 563	90
Cox, Ex parte	31 L. J. (Bkcy.) 49	364
—— *v.* Toole	20 Beav. 145	541
Crawshay *v.* Maule	1 Sw. 495	607
Creswick *v.* Harrison	Set. Dec. 441	541
Crossley *v.* Lightowler	Law Rep. 2 Ch. 478	78
Cruse *v.* Paine	Law Rep. 6 Eq. 641	7
Curtis *v.* Price	12 Ves. 89	238
Curtis's Case	Law Rep. 6 Eq. 455	33

D.

Dale *v.* Hamilton	2 Ph. 266	549
Daniel *v.* Anderson	8 Jur. (N. S.) 328	134
—— *v.* M'Carthy	7 Ir. C. L. Rep. 261	98
Darby *v.* Darby	3 Drew. 495	607
D'Arcy *v.* Tamar, &c., Railway Company	Law Rep. 2 Ex. 158	465
Darnley (Lord) *v.* London, Chatham, and Dover Railway Company	1 D. J. & S. 204	76
Davidson *v.* Tulloch	3 Macq. 783	381
Davies' Case	3 Mod. 246	565
Davies *v.* Nicolson	2 De G. & J. 693	284
—— *v.* Ottey	33 Beav. 540	550
Davis and Denton, Ex parte	Law Rep. 2 Ch. 363	693
—— *v.* Earl of Dysart	20 Beav. 405	419
Daw *v.* Eley	2 H. & M. 725	677
Dawes' Case	Law Rep. 6 Eq. 232	25, 269
De Beville's (Baron) Case	7 Eq. 11	326, 777
De la Rue *v.* Dickinson	3 K. & J. 388	339
De Mattos *v.* Gibson	4 De G. & J. 276	655
Dennison, Ex parte	3 Ves. 552	404
Denton *v.* Lord Manners	2 De G. & J. 675	311
De Pass's Case	4 De G. & J. 544	23
Derbishire *v.* Home	3 D. M. & G. 80	596
De Wolf *v.* Lindsell	Law Rep. 5 Eq. 209	736
D'Eyncourt *v.* Gregory	Law Rep. 3 Eq. 382	637
Dietrichsen *v.* Cabburn	2 Ph. 52	656
Dodds *v.* Hills	2 H. & M. 424	144

		PAGE
Doe *v.* Mitchell	2 M. & S. 446	248
—— *v.* Page	5 Q. B. 767	737
—— *v.* Reid	10 B. & C. 849	655
—— *v.* Ross	7 M. & W. 102	216
Drake *v.* Symes	Joh. 647	339
Dresser *v.* Johns	28 L. J. (C.P.) 281	100
Duckworth, In re	Law Rep. 2 Ch. 578	60, 177
Duke *v.* Andrews	2 Ex. 290	181
Durnford *v.* Lane	1 Bro. C. C. 106	38
Dutton *v.* Morrison	17 Ves. 193	131
Dyer, Ex parte	Parl. Pat. Rep. 1829, 197	578
Dyson *v.* Hornby	7 D. M. & G. 1	364

E.

Eaden *v.* Firth	1 H. & M. 573	393
Eagle Insurance Company, Ex parte	4 K. & J. 549	466
Eastern Counties Railway Company *v.* Hawkes	5 H. L. C. 331	525
East of England Banking Company, In re	Law Rep. 6 Eq. 368; Ibid. 4 Ch. 14	644
Eaves *v.* Hickson	30 Beav. 136	438
Edwards *v.* Freeman	2 P. Wms. 447	283
Elkington's Case	Law Rep. 2 Ch. 511	187, 777
Elliotson *v.* Feetham	2 Bing. N. C. 134	394
Ellis *v.* Sheffield Gas Consumers' Company	2 E. & B. 767	77
Elmhirst *v.* Spencer	2 Mac. & G. 45	86
Ernest *v.* Weis	2 Dr. & Sm. 561	379
Evans's Case	Law Rep. 2 Ch. 427	777
Evans *v.* Coventry	8 D. M. & G. 835	481
—— *v.* Jones	11 Jur. (N.S.) 784; 3 H. & C. 423	624
—— *v.* Wood	Law Rep. 5 Eq. 9	6
Eversfield *v.* Mid-Sussex Railway Company	3 De G. & J. 286	526
Eyre *v.* Burmester	10 H. L. C. 90	144

F.

Fagg *v.* James	8 L. T. (N. S.) 5	144
Faversham (Mayor, &c., of) *v.* Ryder	5 D. M. & G. 350	311
Field *v.* Moore	7 D. M. & G. 691	38
Firth *v.* Ridley	33 L. J. (Ch.) 598	77
Fisher *v.* Dixon	12 Cl. & F. 312	634
Fleming *v.* Self	3 D. M. & G. 997	212
Flood *v.* Patterson	29 Beav. 295	737
Flower *v.* London, Brighton, and South Coast Railway Company	2 Dr. & Sm. 330	526
Foley *v.* Hill	1 Ph. 399; 2 H. L. C. 28	294
—— *v.* Parry	2 My. & K. 138	584
Foot, Re	1 Gl. & J. 240	144
Footner *v.* Sturgis	5 De G. & Sm. 735	541
Foss *v.* Harbottle	2 Hare, 461	386
Fountaine *v.* Carmarthen Railway Company	Law Rep. 5 Eq. 316	468

		PAGE
Foxley, Ex parte	Law Rep. 3 Ch. 515	625
Fox's Case	Law Rep. 5 Eq. 118	181
Frazer *v.* Jones	5 Hare, 475	144
Frith *v.* Cartland	2 H. & M. 417	765

G.

Gale *v.* Reed	8 East, 80	656
Galloway *v.* Mayor, &c., of London	Law Rep. 1 H. L. 34	526
Galsworthy *v.* Durrant	2 D. F. & J. 466	364
Garden *v.* Ingram	23 L. J. (Ch.) 478	244
Gee *v.* Lancashire and Yorkshire Railway Company	6 H. & N. 211	114
General Discount Company *v.* Stokes	17 C. B. (N. S.) 765	278
German Mining Company, In re	4 D. M. & G. 19	365, 754
Gledhill, Ex parte	9 W. R. 791	181
Godfrey *v.* Tucker	33 Beav. 280	76
Goldsmid *v.* Tunbridge Wells Improvement Commissioners	Law Rep. 1 Ch. 349	76, 161
Goodricke *v.* Taylor	2 D. J. & S. 135	625
Gore *v.* Bowser	3 W. R. 430	95
Gosden *v.* Dotterill	1 My. & K. 56	574
Great Northern Railway Company *v.* Manchester, &c., Railway Company	5 De G. & Sm. 138	656
Greene's Settled Estates, In re	10 Jur. (N. S.) 1098	235
Greenshield's Case	5 De G. & Sm. 599	278
Gregory *v.* Hurrill	5 B. & C. 341	737
Greville *v.* Browne	7 H. L. C. 689	313
Grissell *v.* Bristowe	Law Rep. 3 C. P. 112	5, 442
Grocers' Company *v.* Donne	3 Bing. N. C. 34	152
Gunn's Case	Law Rep. 3 Ch. 40	181, 332

H.

Habershon *v.* Blurton	1 De G. & Sm. 121	95
Hadley *v.* Baxendale	9 Ex. 341	114
Halliday *v.* Holgate	Law Rep. 3 Ex. 299	55
Hamilton *v.* Wright	9 Cl. & F. 111	541
Hankey *v.* Garratt	3 Bro. C. C. 456	364
Harmer *v.* Priestly	16 Beav. 569	307
Harper, Re	10 Beav. 284	618
Harris *v.* Davison	15 Sim. 128	95
Harrison, In re	1 H. & C. 819	650
——— *v.* Brown	5 De G. & Sm. 728	379
Hart *v.* Alexander	2 M. & W. 484	667
Hartley *v.* Pehall	1 Peake, N. P. 178	655
Hart's Case	Law Rep. 6 Eq. 512	33
Harvey *v.* Beckwith	12 W. R. 819	613
Hatfield Cask Company, In re	9 Jur. (N. S.) 997; 11 W. R. 971	16
Hawkins *v.* Maltby	Law Rep. 3 Ch. 188	6
Hawthorn *v.* Shedden	3 Sm. & Giff. 293; 2 Jur. (N. S.) 749	589
Hebb's Case	Law Rep. 4 Eq. 9	181
Hellawell *v.* Eastwood	6 Ex. 295	637
Henderson *v.* Appleton	Chitty on Bills, 10th Ed. p. 355	17
——— *v.* Lloyd	3 F. & F. 7	624

		PAGE
Herefordshire Banking Company, In re	Law Rep. 4 Eq. 250	16, 644
Hewitt *v.* Loosemore	9 Hare, 449	41
Higginson *v.* Blockley	1 Jur. (N. S.) 1104	677
Hill *v.* Browne	Dru. 426	541
—— *v.* Evans	31 L. J. (Ch.) 457; 4 D. F. & J. 288	677
Hill's Case	Law Rep. 4 Ch. 769, n.	769
Hills *v.* Croll	2 Ph. 60	655
Hoare's Case	30 Beav. 225	754
Hobday *v.* Peters	28 Beav. 354	42
Hobson *v.* Blackburn	1 Keen, 273	312
Hodgkinson *v.* Kelly	Law Rep. 6 Eq. 496	7, 25
Hodgson *v.* Newman	Cited 5 T. R. 236	625
Holbird *v.* Anderson	5 T. R. 235	625
Holcombe *v.* Hewson	2 Camp. 391	655
Hollis *v.* Claridge	4 Taunt. 807	628
Holmes *v.* Eastern Counties Railway Company	3 K. & J. 675	656
Hooper *v.* Gumm	Law Rep. 2 Ch. 282	138
Hope, Ex parte	3 M. D. & D. 720	401
—— *v.* Carnegie	Law Rep. 4 Ch. 264	699
—— *v.* Liddell	7 D. M. & G. 331	216
Hopgood *v.* Ernest	3 D. J. & S. 116	290
Horn *v.* Coleman	5 W. R. 409	265
Hosier *v.* Arundell	3 B. & P. 11	438
Houghton *v.* Houghton	11 Sim. 491	607
Humble *v.* Hunter	12 Q. B. 310	404
Humphreys *v.* Humphreys	3 P. Wms. 349	248
Hurlstone *v.* Ashton	11 Jur. (N. S.) 725	588
Hyam's Case	1 D. F. & J. 75	23

I.

Imperial Bank of China *v.* Bank of Hindustan	Law Rep. 6 Eq. 91	687
Incorporated Society *v.* Richards	1 D. & War. 258	728
Ingram *v.* Thorp	7 Hare, 67	711
Inman *v.* Clare	Joh. 769	428
Isaacson *v.* Harwood	Law Rep. 3 Ch. 225	457

J.

Jackson, Ex parte	1 Ves. 131	667
—— *v.* Hobhouse	2 Mer. 483	41
—— *v.* Oglander	2 H. & M. 465	549
—— *v.* Woolley	8 E. & B. 778	736
Jacomb *v.* Knight	11 W. R. 812	393
James, Ex parte	8 Ves. 337	364, 545
—— *v.* Allen	3 Mer. 17	311
Jebb *v.* Tugwell	20 Beav. 461	2
Jeffreys *v.* Machu	29 Beav. 344	192
Jenner *v.* Morris	1 Dr. & Sm. 218; 3 D. F. & J. 45	755
Jennings *v.* Broughton	5 D. M. & G. 126	104
Jenour *v.* Jenour	10 Ves. 562	697
Johnson, Ex parte. In re Direct East and West Junction Railway Company	1 Jur. (N. S.) 913	484
—— *v.* Johnson	4 Beav. 318	302

		PAGE
Johnston *v.* Dobie	Morison, 5543	634
Jolly *v.* Handcock	7 Ex. 820	38
Jones *v.* Edney	3 Camp. 285	656
—— *v.* Smith	1 Hare, 43; 1 Ph. 244	39
—— *v.* Williams	Amb. 651	311
Joyce *v.* De Moleyns	2 J. & Lat. 374	145

K.

Kavanagh *v.* Coal Mining Company of Ireland	14 Ir. C. L. Rep. 82	134
Kay *v.* Hargreaves	14 L. T. (N. S.) 281	339
Kearns *v.* Leaf	1 H. & M. 681	481
Kearsley *v.* Cole	16 M. & W. 128	205
Keates *v.* Lyon	Law Rep. 4 Ch. 218	655
Kellock's Case	Law Rep. 3 Ch. 769	644
Kemp *v.* King	2 Moo. & Rob. 437	216
Kendall *v.* Granger	5 Beav. 300	312
Kent *v.* Freehold Land Company	Law Rep. 3 Ch. 493	509, 737
Keppell *v.* Bailey	2 My. & K. 517	655
Kernot *v.* Potter	3 D. F. & J. 447	294
King, Ex parte	Law Rep. 4 Eq. 566; Ibid. 3 Ch. 10	276
Knowles *v.* Greenhill	30 L. J. (Ch.) 670; 5 L. T. (N. S.) 166	561
Kuper's Case	3 De G. & Sm. 113	276

L.

Lacey, Ex parte	6 Ves. 625	545
Laing's Trusts, In re	Law Rep. 1 Eq. 416	235
Lambert *v.* Buckmaster	2 B. & C. 616	216
Lancashire *v.* Lancashire	2 Ph. 657	697
Lanchester, Ex parte	17 Ves. 512	65
Langston *v.* Boylston	2 Ves. 101	348
Langton *v.* Langton	7 D. M. & G. 30	244
Lawrence, Ex parte	1 D. J. & S. 307	364
Laycock *v.* Johnson	6 Hare, 199	364
Lechmere *v.* Clamp	30 Beav. 218	541
Lee *v.* Lee	1 Dr. & Sm. 85	302
Leeds *v.* Barnardiston	4 Sim. 538	346
Lees *v.* Nuttall	1 Russ. & My. 53	550
Leroux *v.* Brown	12 C. B. 801	744
Lett *v.* Parry	1 H. & M. 517	339
Levita's Case	Law Rep. 3 Ch. 36	328, 687
Lingen *v.* Simpson	6 Madd. 290	419
Litchfield's Case	4 De G. & Sm. 141	34
Liversidge *v.* Broadbent	4 H. & N. 603	666
Lloyd *v.* Johnes	9 Ves. 37	238, 448
Lockett *v.* Cary	3 N. R. 405	216
Lockhart *v.* Hardy	9 Beav. 349	404
——— *v.* Reilly	1 De G. & J. 464	736
Loder's Case	Law Rep. 6 Eq. 491	428
Long *v.* Long	2 S. & S. 119	346
Longbottom *v.* Pearce	3 De G. & J. 545, n.	347
Lord, In re	1 K. & J. 90	558
—— *v.* Lee	Law Rep. 3 Q. B. 404	558

		PAGE
Lord Advocate *v.* Lord Dunglas	9 Cl. & F. 174	265
Lowe *v.* Pennington	10 L. J. (Ch.) 83	588
—— *v.* Thomas	5 D. M. & G. 315	574
Luard's Case	1 D. F. & J. 533	276
Lucas *v.* Seale	2 Atk. 56	541
Ludlow (Corporation of) *v.* Greenhouse	1 Bli. (N. S.) 17	379
Lumley *v.* Wagner	1 D. M. & G. 604	656
Lupton *v.* White	15 Ves. 432	766

M.

Macauley, In re	19 L. T. (N. S.) 266	650
Macdougal *v.* Jersey Imperial Hotel Company	2 H. & M. 528.	481
Mackenzie *v.* Gear	Law Rep. 4 Ch. 2, n.	2
——— *v.* Johnston	4 Madd. 374	294
Maclaren *v.* Stainton	3 D. F. & J. 202	481
Macnab *v.* Whitbread	17 Beav. 299	583
Madrid and Valentia Railway Company, In re	15 Jur. 597	483
Magdalena Steam Navigation Company, In re	Joh. 690	755
Makepeace *v.* Rogers	34 L. J. (Ch.) 396	293
Mann *v.* Stephens	15 Sim. 377	224, 656
Manningford *v.* Toleman	1 Coll. 670	144
Mann's Case	Law Rep. 3 Ch. 459, n.	34
Mansell *v.* Feeny	2 J. & H. 313	339
Mant *v.* Leith	15 Beav. 524	284
Markby, In re	4 My. & Cr. 484	321
Marryat *v.* Marryat	28 Beav. 224	457
Marshall *v.* Ulleswater Steam Navigation Company	3 B. & S. 732	564
Martin *v.* Foster	7 D. M. & G. 98	346
Martin's Patent Anchor Company *v.* Morton	Law Rep. 3 Q. B. 306	277
Mather *v.* Fraser	2 K. & J. 536	634
Matthews *v.* Wallwyn	4 Ves. 118	290
Maughan *v.* Vinesberg	Law Rep. 3 C. P. 318	693
Mead *v.* Davison	3 Ad. & E. 303	613
Mersey Docks Trustees *v.* Gibbs	Law Rep. 1 H. L. 93	164
Messenger *v.* Andrews	4 Russ. 478	584
Metropolitan Counties Asylum *v.* Brown	26 Beav. 454	637
Middleton, Ex parte	10 L. T. (N. S.) 517	61
Midland Counties Benefit Building Society, In re	10 Jur. (N. S.) 691	561
Migotti's Case	Law Rep. 4 Eq. 238	776
Mildmay *v.* Lord Methuen	1 Drew. 216	152
Milne *v.* Gilbart	5 D. M. & G. 510	302
Milner *v.* Lord Harewood	18 Ves. 259	38
Mitchel *v.* Reynolds	1 P. Wms. 181	656
Money *v.* Money	3 Drew. 256	346
Monro, Ex parte	Buck. 300	290
Montefiore *v.* Behrens	Law Rep. 1 Eq. 171	96
Moon *v.* Durden	2 Ex. 22	737
Morgan, Ex parte	32 L. J. (Bkcy.) 61	353
———, Ex parte	1 D. J. & S. 288	364, 400
——— *v.* Great Eastern Railway Company	1 H. & M. 78	394

		PAGE
Morice *v.* Bishop of Durham	9 Ves. 399; 10 Ves. 522	311
Morret *v.* Paske	2 Atk. 52	541
Morris *v.* Dimes	1 Ad. & E. 654	565
Mosley *v.* Baker	6 Hare, 87	212
Moss, Ex parte	Law Rep. 3 Ch. 29	354
Mowatt *v.* Blake	31 L. T. 387	404
Myers *v.* United Guarantee and Life Assurance Company	7 D. M. & G. 112	244

N.

Nation's Case	Law Rep. 3 Eq. 77	769
Navulshaw *v.* Brownrigg	2 D. M. & G. 441	295
Neilson *v.* Harford	1 Webst. Pat. Cas. 331	677
Newport *v.* Bryan	5 Ir. Ch. Rep. 119	457
Nicholas, Ex parte	2 D. M. & G. 271	278
Noell *v.* Robinson	2 Ventr. 358	313
Norrish *v.* Marshall	5 Madd. 475	290
Norton *v.* Cooper	5 D. M. & G. 728	265
Nunn *v.* Wilsmore	8 T. R. 521	625

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	183, 269, 500, 509, 536, 687, 711
Ogilvie *v.* Jeaffreson	2 Giff. 353	144
Oriental Steam Company *v.* Briggs	10 W. R. 125; 31 L. J. (Ch.) 241	181
Ormerod, Re	3 De G. & J. 249	782
Owen *v.* Griffith	1 Ves. Sen. 250	265
—— *v.* Hornan	3 Mac. & G. 378; 15 Jur. 339	205
Oulds *v.* Harrison	10 Ex. 572	176
Oxley *v.* Holden	8 C. B. (N. S.) 666	578

P.

Page, Ex parte	1 D. J. & S. 283	65
Paine *v.* Hutchinson	Law Rep. 3 Ch. 388	5, 442
Palmer *v.* Hendrie	27 Beav. 349	404
Parbury's Case	3 D. F. & J. 80	278
Pardo *v.* Bingham	Law Rep. 4 Ch. 735	744
Parker *v.* Butcher	Law Rep. 3 Eq. 762	212
——— *v.* Housefield	2 My. & K. 419	541
——— *v.* Whyte	1 H. & M. 167	144
Parkinson *v.* Hanbury	Law Rep. 2 H. L. 1	546
Parr, Ex parte	1 Rose, 76	53
—— *v.* Applebee	7 D. M. & G. 585	138
Pearson *v.* Pearson	Law Rep. 1 Ex. 308	400
Pease *v.* Jackson	Law Rep. 3 Ch. 576	138
Peele, Ex parte	6 Ves. 602	667
Peele's Case	Law Rep. 2 Ch. 674	138, 180
Pell *v.* De Winton	2 De G. & J. 13	317
Pellatt's Case	Law Rep. 2 Ch. 527	186
Pell's Case	Law Rep. 8 Eq. 222	777

		PAGE
Pennell *v.* Deffell	4 D. M. & G. 372	765
——— *v.* Earl Dysart	27 Beav. 542	419
Pentelow's Case	Law Rep. 4 Ch. 178	535
Petrie, Ex parte	Law Rep. 3 Ch. 232	130
Philanthropic Society *v.* Kemp	4 Beav. 581	312
Phillipo *v.* Munnings	2 My. & Cr. 309	438
Phillips *v.* Eastwood	Ll. & G. 270	574
——— *v.* Phillips	8 Jur. (N. S.) 145; 10 W. R. 236	144
——— *v.* ———	9 Hare, 471	294
Pilkington *v.* Wignall	2 Madd. 240	85
Pimm *v.* Insall	1 Mac. & G. 449	38
Plate Glass Company *v.* Meredith	4 T. R. 794	152
Pledge *v.* Buss	Joh. 663	206
Plummer, In re	1 Ph. 56	53
Pomfret *v.* Ricroft	1 Wms. Saund. 321, n. 6	135
Ponsford *v.* Walton	Law Rep. 3 C. P. 167	48
Potter, Ex parte	13 W. R. 189	48
Potter's Case	13 Jur. 691; 1 De G. & Sm. 728	216
———	1 De G. & Sm. 729	628
Powles *v.* Hargreaves	3 D. M. & G. 430	427
President of the United States *v.* Drummond	Cited 7 H. L. C. 155	314
Preston *v.* Wilson	5 Hare, 185	364
Price *v.* Barker	4 E. & B. 760; 1 Jur. (N.S.) 775	205
—— *v.* Byrn	Cited 5 Ves. 681	546
—— *v.* Carver	3 My. & Cr. 157	541
Price's Trust Deed, In re	Law Rep. 6 Eq. 460	364
Prince's Case, The	4 Rep. part 8, p. 145	564

R.

Ramsden *v.* Hylton	2 Ves. Sen. 304	565
Rangeley *v.* Midland Railway Company	Law Rep. 3 Ch. 306	196
Rawlings, Ex parte	1 D. J. & S. 225	65
Rawlins *v.* Wickham	3 De G. & J. 304	711
Raphael *v.* Thames Valley Railway Company	Law Rep. 2 Ch. 147	195
Reg. *v.* Longton Gas Company	29 L. J. (M.C.) 118	80
—— *v.* Train	2 B. & S. 640	77
—— *v.* United Kingdom Telegraph Company	2 B. & S. 647, n. (a)	77
—— *v.* Wycombe Railway Company	Law Rep. 2 Q. B. 310	527
Reid's Case	24 Beav. 318	34
Renard *v.* Levinstein	11 L. T. (N. S.) 79	676
Rex *v.* Inhabitants of Piddletrenthide	3 T. R. 772	565
—— *v.* Moore	3 B. & Ad. 184	395
—— *v.* Pease	4 B. & Ad. 30	152
—— *v.* Russell	6 B. & C. 566	153
Rice *v.* Wiseman	1 Roll. Rep. 259; 3 Bulstr. 82	564
Richardson *v.* Jenkins	1 Drew. 477; 17 Jur. 446	455
Riches *v.* Evans	9 C. & P. 640	625
——— *v.* Owen	Law Rep. 3 Ch. 820	364
Robinson *v.* Geldard	3 Mac. & G. 735	312
Rochdale Canal Company *v.* King	2 Sim. (N. S.) 78	78
Rochester (Corporation of) *v.* Lee	2 D. M. & G. 427	265
Rochford *v.* Hackman	9 Hare, 475	299
Rogers *v.* Langford	1 C. & M. 637	17

		PAGE
Rolfe *v.* Flower	Law Rep. 1 P. C. 27	667
—— *v.* Rolfe	15 Sim. 88	662
Roots, Ex parte	Law Rep. 2 Ch. 559	693
Rose *v.* Watson	10 H. L. C. 672	109
Rowley, In re	1 D. J. & S. 417	630
Royal British Bank *v.* Turquand	6 E. & B. 327	469
Royal Hotel Company of Great Yarmouth, In re	Law Rep. 4 Eq. 244	482
Royston Grammar School, In re	9 L. J. (Ch.) 250	785

S.

Sadd *v.* Maldon, &c., Railway Company	6 Ex. 143	526
Sadler's Case	3 De G. & Sm. 36	276
Sainsbury *v.* Jones	5 My. & Cr. 1	105
Sambroke *v.* Hanbury	Set. Dec. 427	541
Sampson *v.* Pattison	1 Hare, 533	541
Sands *v.* Clarke	8 C. B. 751	17
Saunders *v.* Lord Annesley	2 Sch. & Lef. 73	134
Savage *v.* Foster	9 Mod. 35	41, 596
Savin, Ex parte	Law Rep. 1 Ch. 616	692
Schweitzer *v.* Mayhew	31 Beav. 37	541
Selkrig *v.* Davies	2 Dow. 230	130
Shackell, Ex parte	2 D. M. & G. 842	618
Shaw *v.* Fisher	5 D. M. & G. 596	12
Sheikh Parabdi Sahani *v.* Sheikh Mohammed Hossein	Bengal Law Rep. 1 App. Civil, 37	745
Shelford *v.* Acland	23 Beav. 10; 3 Jur. (N.S.) 8	588
Shelley's Case	1 Rep. 219	237
Shepherd, Ex parte	2 M. D. & D. 204	53
—— *v.* Gillespie	Law Rep. 5 Eq. 293; Ibid. 3 Ch. 764	6
Shepherd's Case	Law Rep. 2 Ch. 16	769
Sheppard *v.* Doolan	3 D. & War. 8	236
—— *v.* Murphy	16 W. R. 948; 1 Ir. Rep. Eq. 490	6
Shewell's Case	Law Rep. 2 Ch. 387	33, 770
Shipman's Case	Law Rep. 5 Eq. 219	770
Shortridge *v.* Bosanquet	16 Beav. 84; 5 H. L. C. 297	25
Sichell's Case	Law Rep. 3 Ch. 119	771
Simmonds *v.* Great Eastern Railway Company	Law Rep. 3 Ch. 797	216
Simpson *v.* Westminster Palace Hotel Company	8 H. L. C. 712	508
Sivell *v.* Abraham	8 Beav. 598	394
Smith *v.* Chichester	2 D. & War. 402	145
—— *v.* Green	1 Coll. 555	307
—— *v.* Hull Glass Company	11 C. B. 897	466
—— *v.* Levaux	2 D. J. & S. 1	294
—— *v.* M'Guire	3 H. & N. 554	466
—— *v.* Pilkington	1 D. F. & J. 120	212
——, Fleming, & Co.'s Case	Law Rep. 1 Ch. 538	175
Smith's Case. In re Reese River Silver Mining Company	Law Rep. 2 Ch. 604; Ibid. 4 H. L. 64	269, 500
Smyth, Ex parte	1 Sw. 337	321
Soltau *v.* De Held	2 Sim (N. S.) 133	81, 394
South Staffordshire Railway Company *v.* Burnside	5 Ex. 129	278

		PAGE
Spackman *v.* Evans	Law Rep. 3 H. L. 171	256
Spirett *v.* Willows	Law Rep. 1 Ch. 520	249
Spokes *v.* Banbury Board of Health	Law Rep. 1 Eq. 42	151
Stackhouse *v.* Countess of Jersey	1 J. & H. 721	145
Staddon, Ex parte	3 M. D. & D 256	175
Stagg *v.* Elliott	12 C. B. (N. S.) 373	468
Stanborough, In re	5 Madd. 89	130
Stanger *v.* Miller	Law Rep. 1 Ex. 58	65, 130
State Fire Insurance Company, In re	1 D. J. & S. 634	482
———, In re	2 H. & M. 722	644
Stephens, Ex parte	Law Rep. 3 Ch. 753	428
Stephenson *v.* Dowson	3 Beav. 342	574
Stevens *v.* Keating	1 Mac. & G. 659	375
Stevenson, Ex parte. In re Cleveland Iron Company	16 W. R. 95	499
——— *v.* Anderson	2 V. & B. 407	348
Stewart *v.* Moody	1 C. M. &,R. 777	625
Stooke *v.* Stooke	35 Beav. 396	574
Stocken's Case	Law Rep. 3 Ch. 412	269
Stocks *v.* Dobson	4 D. M. & G. 11	290
Stockton and Darlington Railway Company *v.* Brown	9 H. L. C. 246	526
Sturge *v.* Dimsdale	6 Beav. 462	312
Sugden *v.* Crossland	3 Sm. & Giff. 192	517
Sullivan, Ex parte	36 L. J. (Bkcy.) 1	130, 693
Swabey *v.* Sutton	1 H. & M. 514	339

T.

Tasker *v.* Small	3 My. & Cr. 63	110
Taylor, In re	11 Sim. 178	785
——— *v.* Dean	22 Beav. 429	613
——— *v.* Plumer	3 M. & S. 562	766
——— *v.* Salmon	4 My. & Cr. 134	549
——— *v.* Southgate	4 My. & Cr. 203	265
Telford *v.* Ruskin	1 Dr. & Sm. 148	339
Tempest *v.* Tempest	7 D. M. & G. 470	312
Thomas *v.* Cross	2 Dr. & Sm. 423	96
Thomason *v.* Moses	5 Beav. 77	727
Thompson *v.* Derham	1 Hare, 358	364
——— *v.* Hudson	Law Rep. 2 Ch. 255	212
——— *v.* Waithman	3 Drew. 628	736
Thompson's Settled Estates, In re	Joh. 418	235
Thomson *v.* Shakespear	1 D. F. & J. 399	314
Thorndike *v.* Hunt	3 De G. & J. 563	144
Thornton *v.* M'Kewan	1 H. & M. 525	400
——— *v.* Sherratt	8 Taunt. 529	655
Thorp *v.* Owen	2 Hare, 607	583
Tipping *v.* St. Helen's Smelting Company	Law Rep. 1 Ch. 66	78
Todd *v.* Studholme	3 K. & J. 324	283
Tonkin *v.* Lethbridge	Coop. G. 43	77
Toulmin *v.* Read	14 Beav. 499	348
Townley *v.* Bedwell	6 Ves. 194	311
Trimingham *v.* Maud	Law Rep. 7 Eq. 201	427
Troup's Case	29 Beav. 353	754
Trustees of British Museum *v.* White	2 S. & S. 594	314
Tucker *v.* Hernaman	4 D. M. & G. 395	365

		PAGE
Tuckley *v.* Thompson	1 J. & H. 126	541
Tulk *v.* Moxhay	2 Ph. 774	222, 655
Turner *v.* Maule	15 Jur. 761	783
——— *v.* Wardle	7 Sim. 80	455
Turney, Ex parte	3 M. D. & D. 276	53
Turquand *v.* Kirby	Law Rep. 4 Eq. 123	381
——— *v.* Marshall	Law Rep. 6 Eq. 112	481

U.

Umpleby *v.* Waveney Valley Railway Company	1 J. & H. 254	698
Underwood's Case	5 D. M. & G. 677	613

V.

Vaughan *v.* Vanderstegen	2 Drew. 408	42
——— *v.* ———	2 Drew. 363	596
Venning *v.* Lloyd	1 D. F. & J. 193	366
Vint *v.* Padget	2 De G. & J. 611	541

W.

Walker *v.* Brewster	Law Rep. 5 Eq. 25	396
——— *v.* Jones	3 Moo. P. C. (N.S.) 397; Law Rep. 1 P. C. 50	404
Wallwyn *v.* Lee	9 Ves. 24	145
Walsham *v.* Stainton	1 D. J. & S. 678	382
Ward *v.* Yates	1 Dr. & Sm. 80	409
Warde *v.* Warde	2 Ph. 786	785
Warden, &c., of Dover Harbour *v.* South Eastern Railway Company	9 Hare, 489	526
Waring, Ex parte	19 Ves. 345	55, 427
Warner and Powell's Arbitration, In re	Law Rep. 3 Eq. 261	558
Watts *v.* Hyde	2 Ph. 406	76
Wearing *v.* Ellis	6 D. M. & G. 596	364
Webb *v.* Hewitt	3 K. & J. 438	207
——— *v.* Ledsam	1 K. & J. 385	437
——— *v.* Manchester and Leeds Railway Company	4 My. & Cr. 120	527
Wensley, Ex parte	1 D. J. & S. 273	48
West *v.* Swinburne	14 Jur. 360	413
Western Bank of Scotland *v.* Bairds	24 Dec. in Court of Session (2nd Series) 859	381
——— *v.* Baird's Trustees	4 Dec. in the Court of Session (3rd Series) 1071	381
Western *v.* MacDermott	Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72	224
Westzinthus, In re	5 B. & Ad. 817	171
Weymouth *v.* Knipe	3 Bing. N. C. 387	628
Whatman *v.* Gibson	9 Sim. 196	223
Wheeler, In re	1 D. M. & G. 434	629
Whicker *v.* Hume	7 H. L. C. 124	314

		PAGE
White *v.* Barker	5 De G. & Sm. 746; 17 Jur. 174	341
——— *v.* Carmarthen Railway Company	1 H. & M. 786	757
——— *v.* Cohen	1 Drew. 312	393
——— *v.* Lady Lincoln	8 Ves. 363	45
——— *v.* Smale	22 Beav. 72	549
Wilday *v.* Barnett	Law Rep. 6 Eq. 193	588
Wilde *v.* Milne	26 Beav. 504	607
——— *v.* Wilde	10 W. R. 503	394
Williams' Case	2 J. & H. 400	508
———, Ex parte	Buck. 13	667
——— *v.* Harding	Law Rep. 1 H. L. 9	60, 278
——— *v.* Jones	13 East, 439	737
——— *v.* Smith	2 H. & N. 443	736
——— *v.* Sorrell	4 Ves. 389	290
Willis *v.* Plaskett	4 Beav. 208	574
——— *v.* Willis	2 Atk. 71	552
Wilson *v.* Hart	Law Rep. 1 Ch. 463	657
——— *v.* Short	6 Hare, 366	711
Winch *v.* Brutton	14 Sim. 379	583
Winter *v.* Innes	4 My. & Cr. 101	667
Withy *v.* Mangles	10 Cl. & F. 215	303
Wood *v.* Dixie	7 Q. B. 892	625
——— *v.* Hardisty	2 Coll. 542; 10 Jur. 486	457
Woollaston's Case	4 De G. & J. 437	269
Wyatt *v.* Barwell	19 Ves. 435	744
Wynch *v.* Grant	2 Drew. 312; 18 Jur. 1010	457
Wynne *v.* Price	3 De G. & Sm. 310	8
Wystow's Case	Cited 4 Man. & Ry. 280, n.	634
Wythes *v.* Lee	3 Drew. 396	109

X.

Xeres Wine Company, In re	Law Rep. 3 Ch. 769	644

Y.

Yates *v.* Jack	Law Rep. 1 Ch. 295	162
York and North Midland Railway Company *v.* Hudson	16 Beav. 485	381

ORDER OF COURT.

1869

Tuesday, the 2nd day of March, 1869.

The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, with the advice and consent of The Right Honourable John Lord Romilly, Master of the Rolls, The Honourable the Vice-Chancellor Sir John Stuart, The Honourable the Vice-Chancellor Sir Richard Malins, and The Honourable the Vice-Chancellor Sir William Milbourne James, Doth hereby, in pursuance and execution of the powers given to him by "The Companies Act, 1867," and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

The General Order of 21st March, 1868, shall from henceforth take effect and be read as if the following rules had been inserted therein, instead of rules 8 and 14 thereof.

8. Copies of such list containing the names and addresses of the creditors, and the total amount due to them, but omitting the amounts due to them respectively, or (as the Judge shall think fit) complete copies of such list, shall be kept at the registered Office of the Company and at the offices of their Solicitors and London Agents (if any), and any person desirous of inspecting the same may at any time during the ordinary hours of business inspect and take extracts from the same on payment of the sum of One shilling.

14. The result of the settlement of the list of creditors shall be stated in a certificate by the Chief Clerk, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the Company are willing to set apart and appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section 14 of the said Act, and the debts or claims (if any) the full amount of which is not ad-

1869

mitted by the Company, nor such as the Company are willing to set apart and appropriate, and the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall shew which of the creditors have consented in writing to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by the said 14th section, and the persons to or by whom the same are due or claimed; but it shall not be necessary to shew in such certificate the several amounts of the debts or claims of any persons who have consented in writing to the proposed reduction, or the payment of whose debts or claims has been secured as aforesaid.

Hatherley, C.
Romilly, M.R.
John Stuart, V.C.
Richp. Malins, V.C.
W. M. James, V.C.

ORDER OF COURT.

1869

Friday, the 19th day of March, 1869.

The Right Honourable William Page Lord Hatherley, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, The Right Honourable the Lord Justice Sir Charles Jasper Selwyn, The Right Honourable the Lord Justice Sir George Markham Giffard, The Honourable the Vice-Chancellor Sir John Stuart, The Honourable the Vice-Chancellor Sir Richard Malins, and The Honourable the Vice-Chancellor Sir William Milbourne James: doth hereby, in pursuance and execution of all powers and authorities enabling him in that behalf, order and direct in manner following:—

1. At the foot of every Petition of Appeal and Rehearing hereafter to be presented to the Lord Chancellor, and at the foot of every Petition for a Rehearing before the Master of the Rolls, or one of the Vice-Chancellors, and of every copy thereof respectively, a statement shall be made of the parties or persons intended to be served with the Order for setting down the same for hearing.

2. After the 15th day of April, 1869, the Registrar shall not place any Cause in the paper of the Court to be heard upon a Petition of Appeal and Rehearing, or upon a Petition of Rehearing, until the Decree or Order appealed from shall have been produced to him, duly passed and entered.

3. All Petitions of Appeal and Rehearing at present in the custody of the Senior Registrar shall be forthwith transmitted by him to and left at the Report Office, to be there filed and preserved under the direction of the Clerks of Records and Writs, and every Petition of Appeal and Rehearing which may hereafter be presented to the Lord Chancellor, and every Petition for a Rehearing before the Master of the Rolls, or one of the Vice-Chan-

1869

cellors, shall be transmitted to and left at the Report Office, to be there filed and preserved under the direction of the Clerks of Records and Writs; and the provisions of the 44th, 45th, 46th, and 47th Rules of the 1st of the Consolidated Orders shall extend and apply to all such Petitions of Appeal and Rehearing.

Hatherley, C.
Romilly, M.R.
C. Jasper Selwyn, L.J.
G. M. Giffard, L.J.
John Stuart, V.C.
Richp. Malins, V.C.
W. M. James, V.C.

ORDER OF COURT.

1869

Thursday, the 29th day of April, 1869.

The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, The Right Honourable the Lord Justice Sir Charles Jasper Selwyn, The Right Honourable the Lord Justice Sir George Markham Giffard, The Honourable the Vice-Chancellor Sir John Stuart, The Honourable the Vice-Chancellor Sir Richard Malins, and The Honourable the Vice-Chancellor Sir William Milbourne James, Doth hereby, in exercise and execution of the powers given to him by the Liquidation Act, 1868, and of all other powers and authorities enabling him in that behalf, Order and direct in manner following:—

1. Every Scheme to be filed in the Court of Chancery pursuant to the Statute 31 & 32 Vict. c. 68, and every Declaration, Affidavit, Petition, Summons, Notice, or other proceeding relative thereto, shall be intituled in the matter of the Liquidation Act, 1868, and in the matter of the Debtor, Bankrupt, or Company, to whose Assets the same relates, and if the same relates to the Assets of a Company which is being wound up under the Companies Act, 1862, and any Act amending the same, then such Scheme shall also be intituled in the matter of the Companies Act, 1862.

2. Every such Scheme shall be marked either with the words "Lord Chancellor," and the name of one of the Vice-Chancellors, or with the words "Master of the Rolls;" and the matter of such Scheme (unless removed by some Special Order of the Lord Chancellor or the Lords Justices) shall accordingly be attached to the Court of such Vice-Chancellor, or to the Court of the Master of the Rolls, as the case may be, in like manner, and for the same purposes, as Causes are attached to a particular Court.

3. Where such Scheme relates to Assets of a Company which is

1869

being wound up under the Companies Act, 1862, and any Act amending the same, by the Court of Chancery or under the supervision of the Court of Chancery, the Scheme shall be marked so as to be attached to the Court of the Judge to whose Court the matter of such winding-up is attached.

4. Every Scheme to be filed as aforesaid shall be printed on paper of the same size and description and in the same style and manner as Bills in Chancery are required to be printed; and every fifth line of each page thereof shall be numbered.

5. Every such Scheme shall be filed in the Office of the Clerks of Records and Writs, and shall have indorsed thereon the name and address of the Solicitor and London Agent (if any) of the Liquidators, and also the address for service of such Solicitor in cases where an address for service is required by the General Orders of the Court.

6. At any time after the expiration of four days from the filing of any such Scheme, any person claiming to be interested as a Creditor or Contributory in the affairs of the Debtor, Bankrupt, or Company to whose Assets the Scheme relates, may, by a requisition in writing, delivered at the Office of the Solicitor of the Liquidators, or of his London Agent (if any), and stating the nature of the interest which such person claims, demand any number, not exceeding ten, of Printed Copies of the Scheme; and the Copies so required shall, within twenty-four hours after such demand, and on payment for each such Copy at the rate of one halfpenny per folio, be delivered to the person so requiring the same, with a Certificate thereon by such Solicitor, or his London Agent, that they are true Copies of the Scheme filed.

7. Except in cases where an Affidavit, verifying a List of Creditors, shall already have been filed, or a list of Creditors shall have been made out under the direction of the Court, the Liquidators, on the day on which the Scheme is filed, or within such further time as the Judge shall allow, shall file, in the Office of the Clerks of Records and Writs, an Affidavit made by some person competent to make the same, verifying a List containing

the names and addresses of the Creditors, and the amounts due to them respectively, so far as the same can be ascertained, and leave the said List, and an Office Copy of such Affidavit, at the Chambers of the Judge. 1869

8. Copies of the Scheme and copies of the List of Creditors, containing the total amount due to them, but omitting the amounts due to them respectively, or (if the Judge shall so direct), complete copies of such List, shall be kept at the Offices of the Solicitor of the Liquidators and his London Agent (if any); and any person claiming to be interested as Creditor or Contributory, may, at any time during the ordinary hours of business, inspect and take extracts from such Scheme and Copy List on payment of the sum of one shilling.

9. The Liquidators shall, within seven days after the filing of the Scheme, or within such further time as the Judge may allow, send to each Creditor whose name is entered in the said List, or to such of them as the Judge shall think fit, and in cases of winding-up, to such of the Contributories as the Judge shall think fit, a Notice of the filing of the Scheme. Such Notice shall state the time when the Scheme was filed, and the place or places where the Scheme may be inspected, and copies thereof obtained; and shall be sent through the post in a prepaid letter addressed to each of the persons to whom the same is to be sent at his last known address or place of abode.

10. Notice of the filing of the Scheme may also, if the Judge shall think fit, after the filing thereof, be published at such times and in such Newspapers as the Judge shall direct. Every such Notice shall contain such particulars as are mentioned in the preceding Rule.

11. After the expiration of one calendar month from the filing of the Scheme, or at such earlier time as the Judge shall think fit, the Liquidators may present a Petition for confirmation of the Scheme. It shall not be necessary in such Petition to set forth the Scheme, but it shall be sufficient to refer thereto.

1869

12. When any Petition to confirm any such Scheme is presented, the Liquidators shall apply to the Judge in Chambers to appoint the day on which the same is to come into the paper for hearing, such day not to be before the expiration of three weeks from the time of such application, and shall cause a notice of such presentation to be inserted in such two Newspapers as the Judge in Chambers shall direct. Such notice shall state the day on which the Scheme was filed, and the day on which the Petition was presented, and the day on which the same is directed to come into the paper for hearing, and the name and address of the Solicitor and London Agent (if any) of the Liquidators.

13. The Petition shall not come on to be heard until at least fourteen clear days after the first insertion of such notice as aforesaid. Such notice shall at least once in every entire week, reckoned from Sunday morning till Saturday evening, which shall have elapsed between the first insertion thereof and the day on which such Petition is directed to come into the paper for hearing, be again inserted in such Newspapers as aforesaid, on such day or days as the Judge in Chambers shall direct.

14. Any Creditor, Contributory, or other person whose rights or interests are affected by such Scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least two clear days before the day on which the Petition for confirmation is directed to come into the paper for hearing, enter an appearance in the Office of the Clerks of Records and Writs, and, in default of so doing, shall not be entitled to be heard, unless by the special leave of the Court.

15. Any person so entering an appearance, shall be deemed to have submitted himself to the jurisdiction of the Court as to payment of costs, and otherwise.

16. No Order for confirming a Scheme, whether with or without alteration or addition, shall be inrolled until the expiration of thirty days from the day of the same having been pronounced, exclusive of Vacations.

17. No caveat shall be entered to stay the inrolment of any Order for confirming a Scheme, with or without alterations or additions; but every such Order may be inrolled after the expiration of thirty days from the day of the same being pronounced, unless in the meantime a Petition for a Rehearing shall have been presented, and an Order for setting down such Petition obtained and served upon the liquidators, such thirty days to be exclusive of Vacations. 1869

18. No Petition for a Rehearing, either before the same Judge or before the Lord Chancellor or the Lords Justices, of the case on which any Order confirming a Scheme, with or without alterations or additions, or Order refusing to confirm a Scheme, has been made, shall, unless by special leave of the Lord Chancellor or the Lords Justices, be presented after the expiration of thirty days, exclusive of Vacations, from the day on which such Order was pronounced, notwithstanding that such Order may not have been inrolled.

19. When an Order has been made for confirming a Scheme, with or without alterations or additions, no person who neither has entered an appearance as aforesaid, nor has by virtue of such special leave as aforesaid been heard in opposition to the confirmation of the Scheme, nor is the legal personal representative of a person who has entered an appearance or been heard in opposition as aforesaid, shall be at liberty to present a Petition for Rehearing before the same Judge, or before the Lord Chancellor or the Lords Justices, unless the Lord Chancellor or the Lords Justices shall, by Special Order, to be applied for by motion on notice to the Liquidators, to be served on their Solicitor or London Agent, give leave to such person to present a Petition for a Rehearing.

20. All Orders made in Chambers under The Liquidation Act, 1868, shall be drawn up in Chambers unless specially directed to be drawn up by the Registrar, and shall be entered in the same manner and in the same Office as other Orders drawn up in Chambers.

21. In cases not expressly provided for by the said Act or by the Rules of this Order, the General Orders and Practice of the Court (including the course of proceeding and practice in the

1869

Judges' Chambers, and the course of proceeding and practice as to Rehearings before the same Judge, or before the Lord Chancellor or Lords Justices), shall, as far as such General Orders and Practice are applicable and not inconsistent with the said Act or this Order, apply to all proceedings in the Court of Chancery under the said Act.

22. The power of the Court and of the Judge in Chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any directions as to the course of proceeding, shall be the same in proceedings in Chancery under the said Act, as in proceedings under the ordinary jurisdiction of the Court.

23. Solicitors shall be entitled to charge and be allowed for all duties performed under The Liquidation Act, 1868, such of the Fees on the higher Scale, authorized by the 2nd Rule of the 38th of the Consolidated Orders and the Regulations as to Solicitors' Fees subjoined thereto as are applicable, unless the Court or Judge shall otherwise specially direct.

24. The Fees of Court set forth or referred to in the Schedule hereto shall be paid in relation to proceedings in Chancery under the said Act, and shall be collected by means of Stamps in manner provided by the General Orders of the Court.

25. This Order shall come into operation on the 1st day of May, 1869.

26. The General Interpretation Clause in the Consolidated General Orders shall apply to the Rules of this Order; and in this Order the term "Liquidators" has the same meaning as in The Liquidation Act, 1868, and the word "Contributory" has the same meaning as in The Companies Act, 1862.

Hatherley, C.
Romilly, M.R.
C. Jasper Selwyn, L.J.
G. M. Giffard, L.J.
John Stuart, V.C.
Rich^d. Malins, V.C.
W. M. James, V.C.

THE SCHEDULE.

1869

FEES TO BE COLLECTED BY MEANS OF STAMPS.

In the Judges' Chambers and in the respective Offices of the Registrars, the Examiners, and the Taxing Masters, such of the Fees by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, directed to be collected and paid, as are applicable.

In the Record and Writ Clerks' Office.

	£	*s.*	*d.*
For filing every Scheme under the Liquidation Act, 1868	1	0	0
For every certificate of filing a Scheme	0	5	0

And such other Fees by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto directed to be paid and collected, as are applicable.

In the Office of the Lord Chancellor's Principal Secretary.

For every Petition	1	0	0

In the Office of the Secretary at the Rolls.

For every Petition	1	0	0

1869 ORDER OF COURT.

Wednesday, the 28th day of July, 1869.

I, The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable Sir George Markham Giffard, one of the Lords Justices of Appeal in Chancery, do hereby, in pursuance of all powers and authorities enabling me in this behalf, Order and direct in manner following, that is to say:—

Every Order pronounced by the Court of Appeal in Chancery, upon an Appeal from the Court of the Vice-Warden of the Stannaries of Cornwall, under the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 124, shall be drawn up and entered by the Registrar of the Court of Chancery in attendance, and be remitted by him to the Court of the Vice-Warden, by transmitting an Office Copy thereof by post, but without fee, to the Registrar of the Vice-Warden.

Hatherley, C.
G. M. Giffard, L.J.

Chancery Appeal Cases

(Including Bankruptcy and Lunacy Cases)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

CAPPS *v.* CAPPS.

L. C.
1868
Nov. 13.

Practice—Revivor—Infants—15 & 16 *Vict. c.* 86, *s.* 52.

Where proceedings had been taken in a suit which was abated by the death of a party:—

Held, that there was no jurisdiction to make an order against infant heirs to revive, and that they should be bound by the proceedings.

THIS was an administration suit in which an order had been made for the sale of real estate, and it had lately been discovered that when this order was made, the heir-at-law of the testator in the suit was dead, whereby the suit had become abated. The co-heirs of the heir-at-law, who now represented him, were infants. An application had been made before the Master of the Rolls, on the usual allegation, that the suit might be revived against the co-heirs, and that they might be bound by the proceedings. The Master of the Rolls thought that he could not make the order, and

Mr. *L. Field* now renewed the application:—

By 15 & 16 Vict. c. 86, s. 52, the parties on whom the order is made must all be served, and will have an opportunity of dis-

L. C. 1868 CAPPS v. CAPPS.

charging it. In *Jebb* v. *Tugwell* (1) such an order was made, and in *Mackenzie* v. *Gear* (2) a similar order was made *nunc pro tunc*. The only question is, whether we are bound to file a new bill in the nature of a bill of revivor, or can obtain this order in the summary mode pointed out by the Act above referred to.

LORD CAIRNS, L.C., observed that the only thing which parties could do on being served with the order to revive was to move to discharge it as irregular; but the order now asked was not the usual order to revive. Very often, in winding up an old suit, the Court, when it saw that all parties were before it, would make an order dealing with funds, notwithstanding former abatements; and that might be done in this case if these co-heirs were adults, and would appear and submit; but here they were infants, and the Court had not power to make the order under the Act. The application must be refused.

Solicitors: Messrs. *Field, Roscoe, & Co.*

(1) 20 Beav. 461.

(2) V.-C. M. March 2, 1867.

MACKENZIE *v.* GEAR.

In this case *Wickens* applied for a supplemental order to revive *nunc pro tunc*. The suit was instituted in 1830 by the *cestuis que trust* under a settlement against the trustees and others. In 1844 one of the Plaintiffs who had attained a vested interest died, and thereupon the suit became abated, but there was no revivor. Two other children who had also acquired vested interests died in 1840 and 1843. The Court made orders in the suit founded on the deaths of these children, but still without revivor. Subsequently the Defendants, the trustees of the settlement, died, and there were some transmissions of the interests of the other Defendants, the incumbrancers. The last tenant for life having recently died, it was desired to wind up the suit, and get the fund out of Court.

The VICE-CHANCELLOR made an order for revivor *nunc pro tunc*, the order to be in such a form as to cure the several abatements and defects.

See *Freeman* v. *Whitbread* (12 W. R. 619); *Smith* v. *Horsfall* (24 Beav. 331); *Houston* v. *Briscoe* (7 W. R. 394); *Ure* v. *Lord* (13 W. R. 41[illegible]); *Hinde* v. *Morton* (2 H. & M. 368).

(1) 24 Beav. 159. 28 L.J. Ch. 529.
(2) 2 De G. & S. 263. 10 Jur. N.S. 1045

COLES *v.* BRISTOWE.

L. C. and L. JJ.

1868

Nov. 3, 4, 5; *Dec.* 5.

Custom of Stock Exchange—Shares—Jobber's Liability.

The Plaintiff, a holder of 200 shares in a company, by his brokers, contracted on the *Stock Exchange* for the sale of that number of shares to the Defendants, who were jobbers, for a future day called settling-day. Before the settling-day, the jobbers, on a day called the name-day, in accordance with the custom of the *Stock Exchange*, gave to the vendor's broker the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, and on settling-day handed them and the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime the company had stopped payment and was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase-money to the jobbers, and had received but not executed the deeds of transfer, and the Plaintiff, whose name remained on the list of shareholders, was obliged to pay calls on these shares.

The Plaintiff thereupon filed a bill against the jobbers, claiming indemnity against the calls :—

Held, that the contract between the Plaintiff and the jobbers must be interpreted according to the rules of the *Stock Exchange*, and that after the jobbers had paid to the vendor his purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees, through their brokers, had received the transfers and paid their purchase-money to the jobbers, the liability of the jobbers ceased, and the bill was dismissed.

Decree of *Malins*, V.C., reversed.

THE Plaintiff in this case, who was a member of the *Stock Exchange*, through Messrs. *Sutton & Co.*, his brokers, entered into a contract with the Defendants Messrs. *Bristowe*, who were jobbers on the *Stock Exchange*, on the 9th of May, 1866, to sell 200 shares in *Overend, Gurney, & Co, Limited*, at £12 7*s.* 6*d.* a share. This contract was not in writing, and was made for the settling-day following, the 15th of May, 1866, or, in other words, the purchase was to be completed on the settling-day.

Overend, Gurney, & Co., Limited, was a joint stock company, governed by the provisions of the *Companies Act*, 1862, with a register of members as required by that Act. By the articles of the company the transfer of a share was to be executed by the transferor and transferee; the transferor was to be deemed the holder until the name of the transferee should be entered on the

L. C. and L. JJ. 1868 COLES v. BRISTOWE.

register, and the directors might refuse to register the transfer unless the transferee was approved by the board. On May 10, 1866, the day following the contract, the company suspended payment and stopped business, and the transfer books were closed, and on May 11, 1866, a petition to wind up the company was presented, which ultimately led to a winding-up order, the winding-up commencing, according to the Act, on that day, May 11, 1866. On the name-day, which was shortly before the settling-day, the Defendants, according to the custom of the *Exchange*, gave to the brokers of the Plaintiff the names of seventeen persons as transferees of these 200 shares, in different parcels, and at different prices, and the brokers of the Plaintiff thereupon prepared seventeen deeds of transfer, transferring the shares to the seventeen persons named. None of these deeds were in evidence, but a blank form of one was agreed on by the parties, and was as follows:—

"I , in consideration of the sum of paid to by , do hereby bargain, sell, assign, and transfer to the said , of and in the said undertaking called the : To hold unto the said executors, administrators, and assigns, subject to the several conditions on which held the same before the execution hereof; and , the said , do hereby agree to accept and take the said , subject to the conditions aforesaid. As witness," &c.

The various names were inserted in the several transfers, and the transfers were otherwise filled up in the usual manner, and were duly executed by the Plaintiff.

Messrs. *Sutton & Co.* then gave the transfers, and also the certificates of the shares, to the Defendants, and received from them £2475, the price agreed upon. The Defendants afterwards received the prices from the brokers of the seventeen transferees, and handed them the transfers. It was stated in evidence that the transfers were handed to the jobbers, and the money taken from them by Messrs. *Sutton & Co.* by the express directions of the Plaintiff: that by the rules of the *Stock Exchange* the broker of the seller had a right to deliver the transfers directly to the jobber, and to receive the money from him; but that this was not usually done, and the usual course was for the broker of the seller to give the

transfers to the brokers of the transferees, and receive their money from them; the jobber and the seller's broker ultimately settling the difference upon the whole price.

None of the transferees had executed the deeds of transfer, and the Plaintiff's name still remained on the register of the company, and he had been placed on the list of contributories and compelled to pay £4000 in calls. The bill in this suit was therefore filed by him, praying that the Defendants might be ordered specifically to perform the contract, and to procure the shares to be effectually transferred into the names of themselves or their nominees, and to repay to the Plaintiff the amount of calls already paid by him, and to pay all future calls.

A considerable quantity of evidence was entered into on both sides as to the customs of the *Stock Exchange*, the effect of which is stated in the judgment delivered by the Lord Chancellor.

The Vice-Chancellor *Malins*, before whom the case was heard, declared that the Defendants must indemnify the Plaintiff, and made a decree accordingly, as reported (1).

The Defendants appealed, and the appeal was heard before Lord *Cairns*, L.C., Sir *W. Page Wood*, L.J., and Sir *C. J. Selwyn*, L.J.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Whitehorne*, appeared for the Appellants:—

Sir *R. Palmer*, Q.C.:—Both parties in this case are members of the *Stock Exchange*, and must be taken to be cognisant of the customs; there can therefore be no doubt that this contract must be taken to be made under those customs. The Plaintiff says that the jobber is the person liable; we say that his liability ceases when he has given the names of transferees to whom no reasonable objection can be taken. There is such a thing as a sale with registration guaranteed, but then the price is less, and this is, in fact, an attempt to get the benefit of the guarantee without paying for it: *Paine* v. *Hutchinson* (2). In *Grissell* v. *Bristowe* (3) the custom of the *Stock Exchange* is erroneously stated upon the case. With the exception of *Grissell* v. *Bristowe* all the cases are in favour of the Defendants, and shew that the vendor's remedy is against

(1) Law Rep. 6 Eq. 149. (2) Law Rep. 3 Ch. 388.
(3) Law Rep. 3 C. P. 112. Revd 4 C.P. 36

L. C. and L. JJ.
1868
COLES v. BRISTOWE.

the last purchaser: *Shaw* v. *Fisher* (1); *Sheppard* v. *Murphy* (2); *Shepherd* v. *Gillespie* (3); *Evans* v. *Wood* (4). *Hawkins* v. *Maltby* (5) was decided on a point of pleading only.

[The LORD CHANCELLOR:—Is there any evidence that, after a nominee has been accepted, the jobber is bound to see to the registration?]

Probably, until a name has been given and accepted, the jobber remains liable; but when once that has been done, his liability ceases. This is not a contract to sell any specific shares, and, in fact, the *Stock Exchange* is but a clearing house where the buyers and sellers meet to settle.

[The LORD CHANCELLOR:—If I agree with the owner of a leasehold house to buy or find a buyer for it on the 1st of January, and I do find a buyer, who is to indemnify the owner against the covenants?]

Mr. *Cotton*, Q.C.:—The question is, what is the contract? The Vice-Chancellor *Malins* has assumed, as the Judges did in *Grissell* v. *Bristowe* (6), that the jobber contracted to take the shares himself; but that begs the whole question. The contract must be interpreted by the laws of the *Stock Exchange*, though they may make it unlike the usual contract for buying and selling an estate. There is no written contract, and no evidence as to the terms of any verbal contract, and it must all be interpreted by the rules and customs of the *Stock Exchange*, unless those customs are quite unreasonable. The only documents are the notes between the brokers and their principals, and nothing passed between the parties. The Plaintiff says it is hard upon him to have to accept seventeen purchasers of whom he could know nothing; but if that was not done, he would have had to run about and find them, as he might not find anyone ready to take all his shares.

Mr. *Whitehorne*:—The contract alleged by the bill is not the real contract, and would be contrary to all the customs of the *Stock Exchange*. The brokers almost always sell to jobbers, who are not

(1) 1 Jur. (N. S.) 971, 1055; 5 D. M. & G. 596.
(2) 16 W. R. 948; 1 Ir. Rep. Eq. 490.
(3) Law Rep. 5 Eq. 293; 3 Ch. 764.
(4) Ibid. 5 Eq. 9.
(5) Ibid. 3 Ch. 188.
(6) Law Rep. 3 C. P. 112.

large holders, but merely agree to buy with the intention of selling again before the settling-day. If not, no one could undertake the enormous liabilities of a jobber for such small profits. These contracts pass from hand to hand continually till a real purchaser is found, and the jobbers only serve to bring the real seller and buyer together. There are, of course, bargains for money, but then the seller gets a less price, and the custom is to sell for settling-day; this Plaintiff is attempting to get the benefit of a sale for money at the price of a sale for the account.

Mr. *Glasse*, Q.C., for the Plaintiff:—

The vendor, if one of the public, knows nothing about the customs of the *Stock Exchange*, and agrees to sell simply to the jobber, and the execution of the transfer deeds is merely for the convenience of the jobber. The price named in those deeds is not the price at which the vendor sold. The Defendants were bound to take the shares, or, at all events, to get some one to take them, which must include registration, and until that is done their liability remains. The contract to buy implies a contract to indemnify, as on a purchase of leaseholds. If *A.* contracts with *B.*, and *B* with *C.*, there is no privity between *A.* and *C.*, and how can *A.* make *C.* liable? The true construction of the contract may be very inconvenient to jobbers, but in no other way can justice be administered. According to the theory of the Defendants, there is no difference between a broker and a jobber, each being only an agent. We say that the contract is, that the jobber will pay the money and take the shares, or find some one else to do so. If the alleged custom is reasonable, no seller can know when he is free or with whom he is dealing. It is proved that the broker of the seller never inquires into the solvency of the ultimate transferee, and yet if the jobber is freed that is very important. As to the cases, *Hodgkinson* v. *Kelly* (1) is in our favour, *Cruse* v. *Paine* (2) is exactly like this, for the words "with guarantee of registration" have no meaning, and only express what the law implies.

Mr. *Higgins*, with Mr. *Glasse*:—

We have a right to make the Defendants either take the shares

(1) Law Rep. 6 Eq. 496. (2) Law Rep. 6 Eq. 641.

L. C. and L. JJ. 1868 COLES v. BRISTOWE.

and indemnify us, or find some one else who will do so; and if his nominees will not do so, we can come against him, and he against them. With him we contracted, and he must relieve us. Him we know, of his nominees we know nothing. The alleged rules of the *Stock Exchange* are made for the protection of the members, and are not known to or binding on the public. There is no proof that these seventeen persons are real buyers, and, at all events, it is very hard upon the seller to have to pursue seventeen buyers instead of one. Nor has it been shewn that the Plaintiff can do so effectually. The Defendants can; but between the Plaintiff and the ultimate purchasers there is no privity. In *Wynne* v. *Price* (1), there was a complete new contract. In *Evans* v. *Wood* (2) the transfers were actually executed by both parties. *Shepherd* v. *Gillespie* (3) shews that the substitution must be complete; and *Sheppard* v. *Murphy* (4) shews that the liability of the jobber continues until the substitution is complete. The evidence as to the custom is not clear; and if the custom is not clearly proved, we have an ordinary contract with its consequences. Our acceptance of the names amounts only to an acceptance under protest, as we dealt with the jobber directly. Our contract was with the Defendants; it is not clear that we can proceed against the ultimate purchasers; and, at all events, we ought not to be put to the inconvenience of proceeding against seventeen instead of one.

Sir *R. Palmer*, in reply.

Dec. 5. LORD CAIRNS, L.C., now delivered the judgment of the Court. After stating the facts of the case, and that both the Plaintiff and Defendants agreed that the contract was made, and must be interpreted, according to the rules of the *Stock Exchange*, with which they were both familiar, His Lordship continued:—

With regard to the tranferees no suggestion is made in the bill, or in the affidavits on behalf of the Plaintiff, that the transaction was colourable, or other than what it professed to be, or that the

(1) 3 De G. & Sm. 310.
(2) Law Rep. 5 Eq. 9.
(3) Law Rep. 5 Eq. 293; 3 Ch. 764.
(4) 16 W. R. 948; 1 Ir. Rep. Eq. 490.

transferees were not persons for whom the Defendants were authorized to act, and to procure a transfer of and to pay for the shares, or that, as between them and the Defendants, they were not bound by what the Defendants did. On the contrary, the bill treats them as persons whom the Defendants could oblige to execute the transfers and complete their registration; and the Plaintiff in his affidavit alleges further, that the company could not have shewn any valid reason or ground for refusing to register them as transferees, and that, in fact, no such reason or ground existed. In addition to this, one of the Defendants having, at the suggestion of the Court, been called at the hearing and cross-examined on this point, stated that they had received the names of these transferees in the usual course of business through brokers professing to act for them, who paid the money and received the transfers and certificates in the usual way, and had ever since retained them. In these circumstances, the good faith of the transaction being in no way impugned, but being rather recognised by the Plaintiff, we are of opinion that the proper conclusion to draw is, that the whole 200 shares and the transfers of them were duly accepted and paid for by the transferees, and that these transferees were in equity as much bound as if they had executed the deeds.

The registration of these transfers, however, was prevented by the suspension and winding up of *Overend, Gurney, & Co.*, and the Plaintiff, remaining on the register, and liable to the creditors of the company, has filed this bill against the Defendants for an indemnity against these liabilities, and this indemnity he has, in substance, obtained by the decree of the Vice-Chancellor.

If this were an ordinary case of a sale and purchase of shares, in which the Plaintiff was vendor and the Defendants purchasers in the usual acceptation of these terms, the right of the Plaintiff to relief would be clear. The Vice-Chancellor has considered the case to be one of that description, and from that view of the case the Defendants appeal.

The Plaintiff, in his bill, makes this statement as to the custom :—"According to the regular custom and course of business on the said *Stock Exchange*, the intervention of a jobber or dealer, or of some member of the *Exchange* acting in such capacity, is necessary in every transaction either of sale or of purchase of shares

L. C. and L. JJ. 1868 COLES v. BRISTOWE.

in companies, and it would be impossible to carry on such business if the selling broker were always, or as a rule, to insist that the buying dealer, jobber, or member should accept and register a transfer of shares in his own name, and not in the name of his nominee or sub-purchaser; but it is, nevertheless, well understood and universally admitted on the *Exchange* as part of its custom and law, and it is not denied by the Defendants as members thereof, and as jobbers and dealers therein, that any jobber, or dealer, or member who enters into a contract for the purchase of shares is in all respects bound by such contract, and is thereby bound, not only to pay the purchase-money of the shares so bought, but (if required by the vendor so to do) to accept and execute a transfer in the name of the purchaser, and to register or procure the registration of the same in the books of the company."

The same statement is repeated in the 7th paragraph of the Plaintiff's affidavit. It is difficult to understand the meaning of the latter part of this statement—namely, that the jobber is bound to accept and execute a transfer in the name of the purchaser, in the name, that is, of another person. But, passing this by, the whole paragraph is of importance, as an admission that in dealings on the *Stock Exchange* the intervention of a jobber is necessary, and that the selling broker cannot require the jobber to accept and register a transfer in his own name. This admission goes far, in our opinion, to take the case out of the ordinary class, in which there is no intervening jobber (where the vendor can clearly require the purchaser to accept and register a transfer in his own name), and to fix the position of a jobber as an intermediate or third person who undertakes to bring forward a purchaser who will take the shares from the vendor.

The question, however, remains: What is the exact contract or liability of the jobber? It was at one part of the argument of the counsel for the Appellants contended that the dealings of a jobber in shares for any particular settling-day being very large, it was not to be supposed that the jobber intended for the small remuneration he received to assume the liabilities, it might be, of many hundred thousand pounds, and it was suggested that the only undertaking he came under to the seller was that at the settling-day he would pay the price and give a name for the shares, and

L. C. and L. JJ.
1868
COLES v. BRISTOWE.

that thereupon, whether the name was objectionable or unobjectionable, whether the person denoted did or did not accept the shares, the broker was released from liability. This argument, in our opinion, puts the case of the jobber much too high. Such a contract would be highly unreasonable, if not illusory. It would or might practically absolve the jobber from any liability whatever beyond the payment of the purchase-money; and, in very many cases, the mere payment of the purchase-money, without any substitution of liability upon the shares, would effect only a part, and, in cases like the present, the least important part, of the object of the vendor.

Such a limitation of the contract as would involve an immunity of this kind, if it could be maintained on the score of usage or custom, would require to be proved by the clearest evidence, but no such evidence is in this case to be found. There are, besides the Defendant, Mr. *Bristowe*, five witnesses who are members of the *Stock Exchange*, and who speak, and are qualified to speak, as to its rules and usages. None of them have been shaken in their evidence by the Plaintiff on cross-examination, and, out of the five, four have been put forward by the Plaintiff himself to make affidavits not inconsistent with, but stopping short of, the statements as to custom to which we are about to refer. The accuracy, credibility, and knowledge of these witnesses are, therefore, put beyond doubt; and when we add that the only evidence which differs from theirs comes from three persons who are not members of the *Stock Exchange*, and who do not profess to be acquainted with its course of business, it may be said that there is no conflict of evidence in the case. It appears to us that their evidence describes a course of business consistent with, and almost necessarily arising out of, that described by the Plaintiff himself in the paragraph of his bill already referred to. According to this, the contract of the jobber is that at the settling-day he will either take the shares himself, in which case he would, of course, be bound to accept and register a transfer and to indemnify, or he will give the name of one or more transferees, names to which no reasonable objection can be made, who will accept and pay for the shares. The jobber may perform either alternative; and if, electing to perform the latter alternative, he sends in names which are accepted, and to which

L. C. and L. JJ.
1868
COLES v. BRISTOWE.

transfers are executed, and those transfers are taken and paid for by the transferees or their brokers, the jobber is then and at that stage relieved from further liability, and the liability to register and indemnify is shifted to the transferees.

Applying these observations to the facts of the case before us, we are of opinion that the usage of the *Stock Exchange* having been acted upon and acquiesced in by all the parties to the transaction, and the Defendants having, on the 15th of May, given to the Plaintiff the seventeen names for the 200 shares—names admitted to be unobjectionable—and the Plaintiff having made no objection to the number or quality of the transferees, but having accepted these names, and having prepared and executed transfers to them, and these transfers having been accepted and paid for by the transferees, the Defendants thereby duly fulfilled their contract, and any further liability was that of the transferees.

What the measure of that liability was, or how far it was affected by the suspension or winding up of *Overend, Gurney, & Co.*, does not fall to be considered in this Court. It may be well to repeat, in order to prevent misapprehension, that in our opinion the liability of the Defendants continued entire and unbroken until there was an acceptance by the Plaintiff, by the preparation and execution of the transfers, of the names sent in by the Defendants as purchasers, and until there was an acceptance of the shares by the purchasers through the delivery to their brokers of, and payment by their brokers for, the transfers and certificates of the shares. It is difficult to see how this liability can continue after the transfer, as in the present case, of the shares to other persons. If *A.* be trustee of shares for *B.*, and if he require *B.*, as the beneficial owner, to indemnify him against calls or other liabilities, *B.* has clearly the right to say that he will assume the whole liability and ownership, legal as well as equitable, and may require *A.* to transfer to him the shares in respect of which the liability arises. But if such a requisition were made to the Plaintiff in this case, he could not comply with it, for he has transferred the shares and handed over the certificates to other persons as purchasers for value. Lord *Cranworth's* observations in *Shaw* v. *Fisher* (1) apply forcibly to this part of the case: "The Plaintiff cannot make a title to these

(1) 5 D. M. & G. 596, 608.

shares to Mr. *Fisher*, because he has already assigned them to Mr. *Carmichael*. Then it is said that Mr. *Carmichael* has not completed. What does that signify? As far as Mr. *Shaw* is concerned he has executed the deed, and there is nothing to prevent Mr. *Carmichael* at any time coming with that deed, and registering it. Therefore it is plain the Plaintiff cannot now make a title." The evidence of the witnesses to whom I have referred goes on to shew that there are cases on the *Stock Exchange*, more or less numerous, in which a guarantee is given by the jobber that the transferee, after accepting the shares, will register them, and that this is called a guarantee of registration, and that when a jobber gives such a guarantee, the vendor receives less for his shares. This would probably make more emphatic the evidence as to what is the custom in ordinary cases. But even apart from this evidence as to a guarantee, we should have arrived at the conclusion which we have endeavoured to express.

The Plaintiff's counsel in their argument relied strongly on the case of *Grissell* v. *Bristowe* decided by the Court of Common Pleas (1), an authority which appears to have had much weight with the Vice-Chancellor. That was a special case for the opinion of the Court, with power to the Court to draw inferences of fact in the same way as a jury. There were in that special case, and in the reasons for the judgment assigned by the Lord Chief Justice of the Common Pleas, some passages to which we had intended to refer for the purpose of shewing that we could not accept that decision, even supposing it to have remained unreversed, as an authority in favour of the Plaintiff in the present case. But as we understand that the judgment has within the last few days been reversed by the Court of Exchequer Chamber, it is unnecessary to do more than to express our satisfaction that the Courts of Appeal in Equity and at Law have arrived at the same conclusion on this important question. It is unnecessary to comment in detail on the other cases cited in the argument; they were, most of them, cases in which it was held that when, after a contract by a vendor with a jobber or intermediate person, a transfer has been executed by the vendor to, and accepted and paid for by, a third person, the vendor may file a bill against such third

(1) Law Rep. 3 C. P. 112.

L. C. and L. JJ.
1868
COLES v. BRISTOWE.

person, and oblige him to register and indemnify. From what we have said it will be seen that in the principle of those cases we concur.

We should, perhaps, notice a statement of the Plaintiff in his affidavit that he told his brokers that he insisted on his right to keep the Defendants to their contract, and directed them to complete the same with the Defendants directly, and to receive the purchase-money from them, and from no other person. Even assuming this statement to be correct, and passing by the observation that no private instructions given to the Plaintiff's brokers could limit the general authority which, by employing them as his brokers to sell on the *Stock Exchange*, he gave them to sell according to the custom of the *Exchange*, it is clear that these instructions were given after the contract was complete, and could not vary, and indeed did not profess to vary, but to adhere to the contract, whatever that might be. The case of the Plaintiff, in our opinion, wholly fails, and a decree ought now to be made dismissing the bill with costs. There will be no costs of the appeal, and the deposit will be returned.

Solicitor for the Plaintiff: Mr. *A. Jones.*
Solicitors for the Defendants: Messrs. *Lewis, Munns, & Co.*

L. C. and L. JJ.
1868
Nov. 5, 6.

In re EAST OF ENGLAND BANKING COMPANY.

Winding-up—Interest on Debts—Stoppage of Bank—Promissory Notes—Demand for Payment—26th Rule of General Order of November, 1862.

In the voluntary winding up of a joint stock banking company, the creditors on deposit claimed interest at 4½ per cent., being an increase on the previous rate, by virtue of a resolution passed by the directors shortly before the stoppage of the bank, but not communicated to the depositors, and of a subsequent letter from the liquidator to the effect that the increased rate would be allowed:—

Held, that the resolution of the directors, not having been communicated to the depositors, was inoperative; and that the liquidators had no power to make the bank liable for an increased rate of interest.

Interest was also claimed upon bank notes and drafts current at the time of the stoppage:—

7 Eq. 545.
Post 644
11 Eq. 477
13 Eq. 631
16 Eq. 372
14 L.D. 359, 360
17 C.D. 38, 39.

Held, that the claim made to the liquidator was a sufficient presentation and demand for payment, according to the law of merchants, and interest at 5 per cent. was allowed from the date of the claim.

The 26th rule of the General Order of November, 1862, is *ultrà vires*.

Order of *Malins*, V.C., varied.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made on an adjourned summons from Chambers for determining the rate of interest to be allowed to the creditors of the *East of England Banking Company*. The case is reported (1).

The company suspended payment on the 19th of July, 1864. On the 18th of August following a resolution was passed at a general meeting that the company should be wound up voluntarily under the *Companies Act*, 1862, and liquidators were then appointed. On the 3rd of November, 1864, the winding-up was ordered to be continued under the supervision of the Court.

There were two classes of creditors with respect to which contention arose; namely, those who had deposit accounts, on which a fluctuating rate of interest was allowed; and the holders of promissory notes or drafts on the bank payable on demand. A large proportion of the claims of both these classes had been purchased by the *Provincial Banking Corporation*, who had also bought the goodwill of the business.

With respect to the deposit accounts, interest at £4 10*s*. per cent. was claimed on the following grounds:—First, that a resolution had been passed by the directors of the bank on the 6th of July, 1864, in the following terms: "In consequence of the general advance in the rate of interest allowed on deposits by other banks in the district, it is resolved that the present rate to be allowed by this bank on deposits remaining three months be 4½ per cent. on sums amounting to £500 and upwards, and 4 per cent. on sums below £500." And, secondly, that in reply to a letter from the solicitors of the *Provincial Banking Corporation*, it had been stated by the liquidators that interest would be allowed to depositors at the rate mentioned in the above resolution.

Affidavits were filed to prove that the resolution of the 6th of July had been communicated to the managers of the various branches of the *East of England Bank;* but the evidence failed

(1) Law Rep. 6 Eq. 368.

L. C. and L. JJ.
1868
In re East of England Banking Co.

to shew that the resolution had been made known to the customers of the bank.

In respect of the notes and drafts, the *Provincial Banking Corporation* claimed interest, either at £5 per cent under the law of merchants, or £4 per cent. under the 26th rule of the Order of November, 1862, which provides that in the case of debts due from a company which do not bear interest, interest at the rate of £4 per cent. shall be allowed from the date of the winding-up.

The Vice-Chancellor allowed interest at £4 per cent. on the deposits, which was the rate which the Chief Clerk certified to have been the usual rate paid up to the time of the stoppage; and he also allowed the same rate of £4 per cent. on the notes and drafts, considering himself bound by the 26th rule. From this decision the liquidators, and also the *Provincial Banking Corporation*, appealed.

Mr. *Wickens*, and Mr. *Cozens-Hardy*, for the liquidators:—

This case must be considered without reference to the 26th rule. The reason for considering that rule not to have been justified by the *Companies Act*, 1862, and therefore invalid, are stated by Lord *Westbury* in the case of the *Hatfield Cask Company* (1), and acquiesced in by the Master of the Rolls in the case of *In re Herefordshire Banking Company* (2).

With respect to the deposits, we contend that the Vice-Chancellor was correct in holding that neither the resolution of the 6th of July nor the letter of the liquidators had any effect in increasing the rate of interest. There is no evidence that the resolution was communicated to the depositors, nor could the liquidators make a fresh contract with them as to the amount of interest. They were bound to pay interest according to the rate which was allowed at the time of the stoppage. What that rate was is not yet sufficiently ascertained. The Chief Clerk certified that it was £4 per cent., but there was no ground for fixing upon that rate. There should be an inquiry as to the rate allowed in each case, which it will be found is usually below £4 per cent.

With respect to the notes and drafts, no demand was made for payment according to the law of merchants. It may be that the presentation and demand became impossible by reason of the

(1) 9 Jur. (N.S.) 997; 11 W.R. 971. (2) Law Rep. 4 Eq. 250.

3 D. F. & J. 603

stoppage of the bank, but that does not make interest payable: *Beeching* v. *Gower* (1); *Sands* v. *Clarke* (2); *Bowes* v. *Howe* (3); *Henderson* v. *Appleton* (4); *Rogers* v. *Langford* (5). There were two places named in the notes for presentation: the company's bank at *Norwich* and the *London and Westminster Bank* in *London*; and the notes might have been presented in *London* although the bank at *Norwich* had stopped. The claim made under the winding-up was not a demand according to the law of merchants, for such demand must be made to the persons liable to pay.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the *Provincial Banking Corporation*, were not called on to argue the question with respect to the interest on the notes. With respect to the deposits, they contended that the evidence was sufficient to induce the Court to presume that the resolution of the 6th of July had been communicated to the depositors, and was binding on the company. The 95th section of the *Companies Act*, 1862, gave powers to the liquidators to carry on the business of the company, and they had power to make a fresh contract as to interest with the depositors in consideration of their forbearance.

LORD CAIRNS, L.C.:—

With respect to the question raised by the appeal as to the deposits, it appears to me that the evidence is not such as to enable us satisfactorily to deal with it. If I could accept the argument that a new contract had been made by the liquidators with the depositors for allowing interest at the rate mentioned in their letter, there need be no further inquiry on the subject; but I cannot accept that argument. The liquidators did not, and were not authorized to, carry on the business of the bank, their duty was only to wind it up, and they were bound to distribute the assets according to the liabilities as they existed at the time of the stoppage. They had no power to alter those liabilities by making a fresh contract. I am, therefore, of opinion that as the resolution of the 6th of July was not binding, the liquidators'

(1) Holt, N. P. (C.P.) 313.
(2) 8 C. B. 751.
(3) 5 Taunt. 30.
(4) Chitty on Bills, 10th Ed. p. 355.
(5) 1 C. & M. 637.

L. C. and L. J. J. 1868 *In re* East of England Banking Co.

letter to the *Provincial Banking Corporation* had no operation, and that in the present state of the evidence the only course for the Court to pursue is to refer it back to Chambers to inquire whether any and what sum of interest had been credited or paid in each of the accounts to the depositors represented by Mr. *Glasse*, and if it should appear that any rate of interest had been so credited or paid, that will be the rate to which the depositors will be entitled.

I pass now to the other question—namely, that which relates to the notes payable on demand. I am of opinion that there is nothing in the notion that the voluntary winding up of a bank prevents the holder of a note from making a demand for payment. If the note requires to be presented at a particular place it must of course be presented at that place, and the person to whom it is presented will be in all probability the liquidator; and in the present case the notes bearing upon them that they were to be presented either at *Norwich* or at the *London and Westminster Bank*, we find that the liquidation of the liabilities of the company was at *Norwich*, and therefore the proper person to be applied to was the liquidator at that place. The only question, therefore, is one of fact, whether there was any demand for payment. Now, we find there was a letter addressed by the solicitor of the holders to the liquidators at *Norwich* asking information as to the rate of interest allowed, with a view to making a formal demand. This was answered by a letter stating the rate of interest. The holders then sent in a formal demand, and along with the claim they sent in the notes themselves. It was argued that this was not a demand according to the law of merchants. I am not aware that any particular form of demand is required by the law of merchants. It seems to me that, reverting to the literal meaning of a claim, the sending in the claim with the note is, in the strict sense, a demand for payment of the note. It may be said that the claim was made with knowledge that the payment would only be in the ordinary course of liquidation; but it was not the less for that reason a demand for payment. Therefore, I think that the demand was sufficient, and that interest must be allowed at the same rate as would have been recoverable in an action at law, namely, £5 per cent. from the date when each claim was sent in.

I have said nothing, for it is unnecessary to decide the point, on

the effect of the 26th rule of the General Order made in pursuance of the Act of 1862; but I feel bound to add, for I think it is better to say it than to allow the doubt upon the question to continue, that as at present advised I think the rule was *ultrà vires*, and unauthorized by the Act of Parliament. The Act contemplates calls for payment of debts legally due, and the Court of Chancery was not armed with power to burden the contributories with anything beyond. The order of the Vice-Chancellor must be varied; but under the circumstances the costs of all parties may come out of the estate.

Sir W. Page Wood, L.J.:—

I agree with the opinion of the Lord Chancellor. It is impossible to stand upon the resolution of the 6th of July, because not only is there no evidence before us of any communication of that resolution to the depositors,—but if any had existed it would have been produced, since it was their interest to produce it. The matter is therefore reduced to the course of dealing between the parties, and as to this there must be an inquiry.

With respect to the claim for interest on the promissory notes, it would run from the time of demand. The only question is whether there has been a demand. It would certainly be very singular if a claim addressed to a person who has the control of the assets would not be a sufficient demand by the holder to shew that he demanded payment of the money. If the holder had brought an action that would have been sufficient, and the effect of the *Companies Act* is, that the demands which would have been made by action must be made by claim under the winding-up. Here a place is also specified for making the demand, and we find that the holders did make the claim at that place. It was therefore made both in the proper way and at the proper place, and I am of opinion that interest according to the law of merchants must be paid.

Sir C. J. Selwyn, L.J.:—

I am of the same opinion. On the question of the deposits, it is impossible to hold that it was open to the directors to alter the

L. C. and L. JJ. 1868 *In re* EAST OF ENGLAND BANKING CO.

rate of interest without communicating the alteration to the depositors; and if this had been done there would have been evidence of it.

As to the interest on the promissory notes, I cannot suppose that the winding up of a company under a liquidator, which may arise from many other reasons besides insolvency, can preclude the holder of a promissory note of the company from making a demand within the law of merchants.

I also think that the 26th rule was *ultrà vires* so far as it affected debts not bearing interest, and consequently will not support the order of the Vice-Chancellor.

Solicitors for the Liquidators: Messrs. *Sharpe, Parkers, & Pritchard.*

Solicitors for the *Provincial Banking Corporation:* Messrs. *Lewis, Munns, Nunn, & Longden.*

L. JJ. 1868 *Nov.* 6.

In re SMITH, KNIGHT, & CO.

WESTON'S CASE.

Company—Transfer of Shares—Power of Directors to reject Transfer—Date of Commencement of Voluntary Winding-up—Companies Act, 1862, *ss.* 22, 85, 130, 151.

The directors of a company have no discretionary power, independently of powers expressly given to them by the articles of association, to refuse to register a transfer which has been *bonâ fide* made.

Therefore where a transferee gave an address at which he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was at the time in difficulties, and the shares were sold by the transferor in order to get rid of his responsibility.

The decision of the Master of the Rolls reversed.

Where the voluntary winding up of a company is ordered to be continued subject to the supervision of the Court, the winding-up must be deemed to commence from the date of the resolution confirming the winding-up, and not from the presentation of the Petition on which the order is founded.

THIS was an appeal from an order of the Master of the Rolls settling the name of *Edward Weston* on the register as a contribu-

tory of *Smith, Knight, & Co., Limited,* in respect of eighty-five shares.

Edward Weston was the holder of eighty-five shares in the above-named company. On the 18th of June, 1866, he executed a transfer of fifty of these shares to *James Birnie,* who also executed the transfer on the same day. On the 19th of June the transfer was left at the company's office for registration, together with the certificates of the shares.

It appeared that the sale to *Birnie* was negotiated through a Mr. *Wright,* a civil and mining engineer in the city of *London. Birnie* was a relative of *Wright,* and was occasionally employed by him in his business. At the date of the transfer *Birnie* was residing as a guest in *Wright's* house, which was given in the transfer as *Birnie's* address. It did not appear where *Birnie's* usual place of residence was, nor what were his ordinary means of livelihood. The consideration for the transfer of the shares was £50, and it was admitted, on the one hand, that the transferor parted with his entire interest in the shares, and, on the other, that he executed the transfer with the intention of escaping from all future liability in respect of the shares. The company at that time was not in a flourishing condition, and was being carried on by the directors under a letter of license from the creditors.

Upon the transfer coming in for registration, the directors caused inquiries to be made respecting *Birnie* at the address given, and were informed that he did not reside there, but was a friend of the occupier of the house. An agent of the company then applied at *Wright's* business offices, and was informed by a clerk that, to the best of his belief, *Birnie* was not regularly employed there; but *Wright,* overhearing the inquiries, stated that *Birnie* was a clerk of his, but was then absent on business. Under these circumstances, on the 22nd of August the secretary of the company wrote to *Weston's* solicitors that, as *Birnie's* address was incorrectly stated in the transfer, and could not be ascertained, the company must decline to register it.

On the 9th of August *Weston* transferred the remaining thirty-five shares to *R. Harvey,* the transfer was duly executed, and the transfer and certificates were sent the next day to the office of the company for registration. The directors, however, suspecting that

L. JJ. 1868 WESTON'S CASE.

the transfer was not made *bonâ fide*, retained the transfer and certificates till the 2nd of November, and then returned them unregistered.

On the 19th of July a Petition had been presented for winding up the company. On the 28th of July the Petition was directed to stand over till Michaelmas Term. On the 14th of November a resolution was passed to wind up the company voluntarily. On the 30th of November the resolution was confirmed, and on the 18th of December the Petition came on for hearing, and an order was made on it to continue the winding-up under the supervision of the Court.

The material clauses of the articles of association relating to the transfer of shares were as follows:—

"14. The directors may refuse to register the transfer of any share in either of the following cases:—If the transfer is made by a member who is indebted to the company; if the transferee shall fail to comply with the request made in pursuance of the next article.

"15. Before approving or registering any instrument of transfer of any share, the directors may, if they think fit, require the transferee to produce to, and leave with, the secretary for examination the certificate of the share proposed to be transferred.

"18. Any person who has become entitled to a share in any other way than by transfer may, subject to the approval of the board, instead of being registered himself, elect to have some person to be named by him registered as the holder of such share."

Weston having been placed upon the list of contributories, he applied by summons to have the register rectified by removing his name and placing the name of *Birnie* on the register for fifty shares, and that of *Harvey* for the remaining thirty-five. The Master of the Rolls refused the application in both cases, and *Weston* appealed. The case is reported on the point as to the shares sold to *Birnie* (1).

Mr. *Roxburgh*, Q.C., and Mr. *Marten*, for the Appellant:—

With respect to the transfer to *Birnie*, the ground taken by the

(1) Law Rep. 6 Eq. 238.

directors for refusing to register the transfer was that *Birnie's* address was incorrectly given, but the evidence fails to shew any incorrectness. *Birnie* was known and occasionally resided at the address he gave; and the directors, on making inquiry, ascertained who he was, and might have obtained any other information they wished. The 22nd section of the *Companies Act*, 1862, makes shares transferable in such manner as the articles of association may point out, and if there are no provisions in the articles to limit the terms of transfer the directors cannot refuse to register a transfer because they suspect the transferee not to be a responsable person. The exercise of such a power would produce great public inconvenience by checking the facility of transfering shares. It has been established that a transfer may be made to a man of straw for the purpose of getting rid of the responsibility provided the sale be absolute: *De Pass's Case* (1); *Hyam's Case* (2); *Chinnock's Case* (3). In the present case the articles prescribe certain cases in which the directors may refuse or suspend a transfer, and the expression of those cases excludes any others.

With respect to the shares sold to *Harvey*, there was no reason for refusing to register the transfer except the presentation of the Petition for winding up. But the company has been subsequently wound up voluntarily, and the voluntary winding-up, although continued under the supervision of the Court, can only commence from the resolution passed by the company.

[The LORD JUSTICE SELWYN referred to *Hodgkinson* v. *Kelly* (4)].

Mr. *Westlake* (the *Solicitor-General*, Mr. *Baggallay*, with him), for the liquidator:—

Directors have a discretion as to approving proposed transferees of shares, without express words to that effect in the articles of association. The *Companies Act*, 1862, sect. 22, does not deal with the right to transfer shares, but with the question whether they are real or personal estate, and the manner in which they may be transferred, as by deed or otherwise, which it refers to the regulations of the company. The rest of the clause relates to an equally formal matter, the distinguishing of the shares by denoting

(1) 4 De G. & J. 544. (3) Joh. 714.
(2) 1 D. F. & J. 75. (4) Law Rep. 6 Eq. 496.

L. JJ. 1868 WESTON'S CASE.

numbers; and the whole is under the head, "Distribution of Capital." With respect to the argument from public policy, there can be no advantage in facilitating the transfer of shares by members of failing companies to persons whose position will not bear investigation; and if Parliament had contemplated any such thing, the proper place for it would have been under the head, "Provisions for Protection of Members." But if sect. 22 does relate to the right to transfer, still its terms refer the determination of that right to the articles of the company, and those of this company confer no absolute right to transfer. The Act, then, being out of the way, the simple case is that a company is an incorporated partnership. Unanimity is required for the admission of a new partner to an unincorporated partnership, and the effect of incorporation is to substitute the will of a majority for unanimity, but nothing more. Government by a majority is the common law of corporations, but there is no common law rule that throws the doors of corporations open to all those who desire to enter or quit them; on the contrary, the common law is that the right of admission depends on the rules of each particular body. The directors have authority to do what a majority at a general meeting might do: one of the articles of association, as is usual in companies, enables the directors to exercise all such powers of the company as are not by its regulations, or by the Act, only exercisable by general meetings.

[The LORD JUSTICE SELWYN:—How, according to your argument, would the shares be transferable at all?]

They are transferable by the common law of partnerships, subject to conditions, which are changed, first, by incorporation, from the unanimity of the partners to the will of a majority, and secondly, by the powers given to directors, from the assent of a majority in general meeting to that of the directors.

The directors were at least justified in refusing to register the transfer to *Birnie* till they were able to place on the company's books an address where there was some security that he might be found, which they had not been enabled to do before the Petition for winding-up the company was presented. That date was the true commencement of the winding-up. The 151st section of the

Companies Act, 1862, makes the order to continue the winding-up under supervision equivalent to an order for winding-up, and the 85th section enacts that an order for winding up shall date from the filing of the Petition.

Mr. *C. J. Hill*, for *Birnie* and *Harvey*, took no part in the argument.

SIR W. PAGE WOOD, L.J.:—

With respect to the time of the commencement of the winding-up we agree with the decision of the Master of the Rolls in *Dawes' Case* (1), that where there is a voluntary winding-up it must be taken to have commenced from the passing of the second resolution; and we also agree with the same learned Judge in the opinion which he expressed, although not a judicial decision, in the late case of *Hodgkinson* v. *Kelly* (2), that where there is a Petition for winding up and nothing more done, and then resolutions passed for a voluntary winding-up, and afterwards an order made upon the Petition so presented for continuing the winding-up under the supervision of the Court, inasmuch as the order is to continue the winding-up, it must be understood to be the winding-up which commenced at the date of the second resolution, and that it cannot be dated back to the presentation of the Petition, because the thing which is to be continued had no existence at that date.

Therefore, the question is, were the directors justified in refusing to register the transfer to *Birnie* in the present case? It is in evidence that the shares were sold on the 18th of June for a consideration of £1 per share, and that *Weston* ceased to have any interest in them, and had entered into no engagement to indemnify *Birnie;* and *Birnie* thereupon became the proprietor of them subject to their being duly registered. *Birnie* has made an affidavit that he was the owner, and intended to be the owner of them. The directors received the transfer on the 19th of June, and the important question arises what was, I will not say their duty, but their power, as to registering or refusing to register the shares. It is said that the directors were only carrying on the business subject to a letter of license from the creditors, and that it was

(1) Law Rep. 6 Eq. 232. (2) Law Rep. 6 Eq. 496.

L. JJ. 1868 WESTON'S CASE.

their duty to exercise precautions as to the character of the shareholders they admitted. But the creditors had the remedy in their own power. They chose to give a letter of license instead of filing a Petition to wind up the company, as they might have done. Besides, we find that the directors did register other transfers, so that the creditors did not interfere with the registration. We must therefore take the case without reference to the particular circumstances of the company, and as if the directors were acting under their ordinary powers. But was it one of the ordinary powers of the directors to inquire into the condition and position of the persons to whom transfers are made? The Master of the Rolls has come to the conclusion that the directors are competent, and that it is their duty to protect the shareholders from the introduction of persons not able to bear the burdens of the company.

His Lordship says in his judgment (1): "It frequently happens that in articles of association there is a clause authorizing the directors of their own will and pleasure to suspend the registration of transfers or to refuse it. These articles of association do not contain any such clause, but then it is to be considered what is the effect of that clause? and I am much disposed to think that the effect of the clause amounts to very little. The directors are the agents of the company. Their duty is to do the best they can for the company. It is quite clear that the directors would not be doing their duty to the company, or doing that which the rest of the shareholders would require, if they were to allow a large number of persons to be put upon the list who could take dividends if there were any to be paid, but who could not pay calls if there were any required. It is obvious that the directors can within the scope of their authority do for the company what the company themselves can do in general meeting. I am of opinion that the shareholders might say 'We will not have these shares transferred to a person who cannot take upon himself the burdens of the company, but can only get the advantages to be derived from it.' If the company can do that in a general meeting, I am of opinion that it is within the scope of the general authority of the directors, and that they can do it."

I regret to say that my opinion is entirely at variance with these

(1) Law Rep. 6 Eq. 242.

observations. I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility at any time they please by going into the market and disposing of and transferring their shares without the consent of directors, or shareholders, or anybody, provided only it is a *bonâ fide* transaction; by which I mean an out and out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge* v. *Bosanquet* (1), which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the *Companies Act*, 1862, in the 22nd section, gives a power of transferring shares.

Mr. *Westlake* argued that that clause was altogether *alio intuitu*, that it was dealing with the question whether the shares should be treated as real or personal estate, and was not intended to have any such effect as I have stated. I apprehend that, except for that section, the ordinary incidents of partnership would apply. But the very object of all parties who enter into these companies is to have shares which are not like shares in ordinary partnerships, but which are transferable; and all the articles are framed on the supposition that they are so transferable. Indeed, it has always been a subject of discussion whether the establishment of joint stock companies were or not politic, for that very reason that the partners can immediately get rid of all their liabilities. I was therefore greatly surprised at the argument which has been addressed to us to-day, namely, that unless there is something in the articles which makes the shares transferable, they are not transferable at all, except by a resolution of a general meeting. I apprehend the shares are transferable by virtue of the statute, and that the province of the articles is to point out the mode in which they shall be transferred, and the limitations (if any) to which a shareholder shall be subjected before he can transfer.

The only question, then, is, is there anything to restrain the exer-

(1) 16 Beav. 84; *Bargate* v. *Shortridge*, 5 H. L. C. 297.

L. JJ. 1868 WESTON'S CASE.

cise of this right of transfer in the present case? The argument of the liquidators is, that the directors had all the powers of the shareholders, that the shareholders might have excluded the transferees if they thought fit, and, consequently, the directors might exercise the same power. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. When we look at them, two clauses alone are pointed out to us which have any such apparent tendency. Those clauses are the 15th and 18th. The 15th clause has nothing to do with the approval of the transferee, it simply empowers the directors to call for the certificate as evidence that the person applying is really the transferee. Then the 18th clause provides that if an executor, for instance, becomes owner of a share, and wishes to escape from placing himself at all upon the register, he may call upon the directors not to register him as executor, but to register the person to whom he, as executor, sold the share. The power of disapproval in the directors only goes so far that they might refuse to put any person *per saltum* on the register, and might insist on the executor being put on first, and his nominee afterwards. But there is something much stronger to shew that the directors have no such power, for the 14th clause gives power to them to refuse to register the transfer in certain specified cases, a thing wholly unnecessary if they might refuse in all cases.

It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And I may add that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause.

Now, however, comes the question in this case, whether there was any special ground for refusing the transfer? The ground seems to be simply this: the transfer is made to Mr. *Birnie*, and the usual documents are left with the secretary, and the secretary did what, regard being had to the position of the creditors in this

particular case, would have been a reasonable and proper thing for him to do; he went to the office to inquire whether it was the right address. That would not be a thing done ordinarily, because the object of the address being given is not, generally speaking, to know where the shareholder is to be served with process, but where his notices are to be sent. The shareholder gives an address, and he is bound by every notice that is sent to that address, until he gives notice of a change in his address. I am not speaking of a case where a wrong address is fraudulently given. The Master of the Rolls says, that the address in the present case was a false address. I cannot treat the case as amounting to anything so high as that. Many persons likely to deal in shares may be lodgers, and they may not reside in any one place for a long period; surely they are not to be disqualified thereby from purchasing shares, and if they give the address of their lodgings they have done their duty, although they may change their residence the next week.

[His Lordship then referred to the evidence of the inquiries made by the secretary as to *Birnie's* address, and continued:—]

I must say, under these circumstances, that I think Mr. *Weston's* shares were properly and regularly assigned to *Birnie*, and that he is now entitled to have his name taken from the register as having parted with those shares.

With respect to the shares sold to *Harvey*, now that the difficulty as to the commencement of the winding-up has been removed no objection remains to the transfer to him. The directors, it is true, said that they were not satisfied that the transfer was *bonâ fide*, but as they give no grounds for their suspicion we must assume that it was *bonâ fide*.

In both cases, therefore, I am of opinion that Mr. *Weston's* name must be removed from the register.

SIR C. J. SELWYN, L.J.:—

With respect to the fifty shares transferred to *Birnie*, in the view I have taken of the evidence, it becomes unnecessary to decide the general question that has been argued—as to whether the directors had the general power to refuse the transfer in this case. But as that question has been argued, and is one that has a general bearing, I feel bound to state that, like the Lord

L. JJ. 1868 WESTON'S CASE.

Justice, I am unable to concur in that portion of the judgment of the Master of the Rolls in which he treats the directors as being the agents of the company, and in that capacity having such a general and unlimited power. There have been many cases in this Court in which questions have arisen as to the particular limits to be put upon the power of the directors in refusing to register transfers. All these discussions would have been unnecessary if, without any expression in the articles of association, from the very constitution of the company, the directors, as the agents of the shareholders, had such general power. But in the present case the matter does not rest there. In the first place we have the general Act of Parliament which constitutes these companies, one important effect of which is, that the shares, which in an ordinary partnership would not be transferable, are made transferable; and the 22nd section, which has been relied on in argument, merely refers the company to their own articles for determining the manner in which that transfer shall be effected, but leaves the general right of transfer to stand upon the provisions of the Act. Then, when we look at the articles of association in the present case and find that the 14th clause imposes a particular limit upon the authority of the directors, and mentions two cases only in which they may refuse to register a transfer, I think that the rule of *expressio unius, exclusio alterius*, applies most strongly to this case. No doubt, if the directors had reason to believe that the transaction was fraudulent or fictitious, they might refuse to be partakers in any such fraudulent or fictitious transaction. But, in the absence of that, unless they could bring the case within the provisions of the 14th clause, in my opinion they would be bound to register the transfer.

But assuming that in such a case as this the directors had authority for some reasonable cause to refuse to register the transfer of the shares, what is the reasonable cause that is assigned? The only cause upon which any reliance has been placed is that a false address was given. I think the Lord Justice has disposed of that, and shewn that, in point of fact, the address that was given was not only the true but the only address which under the circumstances of the case could be given, and that there was nothing in the fact of this gentleman being only an occasional

clerk which would justify the directors in refusing to accept the transfer.

There remains only the point with respect to the other thirty-five shares which were transferred to *Harvey*, and that depends simply upon the question as to when the commencement of this winding-up is to be fixed. Upon that it is very satisfactory to find that our opinion is entirely in accordance with that expressed by the Master of the Rolls in *Hodgkinson* v. *Kelly* (1). The 130th section of the *Companies Act*, 1862, expressly declares that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up, and the order of the Court, upon which reliance is placed on the part of the Respondents, is not an order in the form of a compulsory order, but simply an order directing the continuance of the voluntary winding-up, which commenced at the time of the passing of the resolution—that is, the confirming resolution—for that, and that only, is directed to be continued.

For these reasons, therefore, I agree with my learned brother that the appeal should be allowed.

Solicitors: Messrs. *Ashurst, Morris, & Co.;* Messrs. *Tathams, Curling, & Walls.*

In re BLAKELY ORDNANCE COMPANY.

LUMSDEN'S CASE.

Company—Infant Transferee—Confirmation, when presumed.

L. transferred fifty shares in a company into the name of *H.*, an infant, not known by him to be such, who was also the transferee of a large number of other shares in the same company. *H.* was registered as the holder. *H.* attained twenty-one more than five months before the winding-up order, and in the interval transferred some of the other shares. He was settled on the list of contributories for the remaining shares, and did not at first raise the defence of his having been an infant, but four months afterwards took out a summons to have his name taken off the list on that ground. The official liquidator then applied to have the name of *L.* placed on the list instead of that of *H.*, in respect of the fifty shares:—

(1) Law Rep. 6 Eq. 496.

L. JJ.
1868
LUMSDEN'S CASE.

Held (affirming the decision of the Master of the Rolls), that *H.* must be held to have affirmed the transaction after he came of age, and that the application must be refused.

A transfer to an infant is not void but only voidable.

Mann's Case (1) explained.

8 Eq 505
— 659
5 Ch 97
— 360,
— 365.
9 Eq 469
4 Eq 455
8 Ch 267
1 Ch D. 431
15 Ch D 238

THIS was a motion of the official liquidator of the *Blakely Ordnance Company, Limited*, by way of appeal from a decision of the Master of the Rolls refusing to substitute the name of *Lumsden* for that of *Hicks* in the register and in the list of contributories in respect of fifty shares in the company.

In July, 1865, *Lumsden*, being the registered holder of the shares in question, sold them in the market to a dealer. The name of *Hicks* was subsequently given as transferee. The shares were duly transferred, and on the 11th of August, 1865, they were registered in the name of *Hicks*. *Hicks* was at this time a minor, and when these shares had been thus registered, he was the registered holder of 520 shares in all.

By the articles of the company a discretion, unlimited in terms, was given to the directors as to accepting any transferee of shares not fully paid up.

On the 19th of January, 1866, *Hicks* came of age. On the 20th of April, 1866, he executed a transfer of some of the 520 shares, not including any of the fifty shares in question.

In July, 1866, an order was made to wind up the company, at which time *Hicks* was on the register for 795 shares. In February, 1867, he received notice that he would be put on the list of contributories for that number of shares, and in June, 1867, he was settled on the list for that number, not having taken any objection on the ground of his infancy. A call was subsequently made, and *Hicks*, on the 20th of October, 1867, took out a summons to have his name removed from the list, on the ground that all the shares had been registered in his name during his minority. This summons had not been disposed of when the present appeal motion was heard.

In February, 1868, the official liquidator took out a summons to substitute the name of *Lumsden* for that of *Hicks* as to the fifty shares in the register and the list of contributories. The

(1) Law Rep. 3 Ch. 459, n.

application having been adjourned into Court, was refused by the Master of the Rolls.

Mr. *Pearson*, Q.C., and Mr. *Higgins*, for the Appellant:—

The directors had discretion as to registering a transfer, and it would have been their duty to refuse to accept *Hicks* had they known that he was a minor. The company had a right, therefore, to repudiate him as soon as they knew that when registered he was an infant. This right has not been lost: *Curtis' Case* (1); *Shewell's Case* (2); *Capper's Case* (3); *Mann's Case* (4). *Hart's Case* (5).

Mr. *Jessel*, Q.C., and *M. F. Harrison*, for *Lumsden*, were not called upon.

SIR W. PAGE WOOD, L.J.:—

It appears to us that this application is, to say the least, premature. We have on the register as proprietor of these shares a person who, though an infant when they were first registered in his name, had been of full age for more than five months at the time of the winding-up order. The transaction originally appears to have been voidable, not void, for a deed will pass an interest to an infant, even when coupled with a liability, if it be for his benefit to accept it. In the cases referred to, the person was an infant at the time of the winding-up order, and the transfer to him then became a nullity, it being clearly for his benefit to repudiate the transaction; but I do not understand the Court in any of them to have laid down that a transfer to an infant was from the first a nullity, so as to be void even if the infant on coming of age should elect to take the shares. Here *Hicks* was of age for months before the winding-up; he made transfers of other shares similarly circumstanced, but he neither repudiated these nor disposed of them. We must consider, therefore, that he elected to keep them, and so affirmed the transaction. Mr. *Pearson* pressed upon us the duty of the directors to reject an infant, and the duty of the transferor to find a competent transferee. No obligation, however, was im-

(1) Law Rep. 6 Eq. 455.
(2) Ibid. 2 Ch. 387.
(3) Law Rep. 3 Ch. 458.
(4) Ibid. 459, n.
(5) Law Rep. 6 Eq. 512.

L. JJ. 1868 LUMSDEN'S CASE.

posed on the transferor beyond finding a transferee who was legally competent to accept the shares; all other objections it was the business of the directors to find out, and unless the liquidator can shew that *Hicks* effectually repudiated the shares, which has not been shewn, the transfer to him cannot now be objected to. We do not prejudge anything as between *Hicks* and *Lumsden*. *Hicks* may have a different case to make, but we must refuse the present application.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. I am equally desirous not to prejudge *Hicks's* application, but for the purposes of the present application we must assume that *Hicks* after he came of age accepted the transfer, and, if so, *Lumsden* satisfies the words of Vice-Chancellor *Giffard*, which have been so much relied on, by shewing that there is a transferee of his upon the register who can be made liable in respect of the shares. In *Capper's Case* (1) I certainly did not mean to decide, nor to treat *Mann's Case* (2) as deciding, that a transfer to an infant is, *ab initio*, a nullity, but my judgment was founded expressly upon the principle laid down in *Reid's Case* (3) and *Litchfield's Case* (4), and I referred to the judgment of Lord Justice *Rolt* in *Mann's Case* as going further than the previous cases in treating the transfer as a nullity; but in that case also, while the transferee was still an infant, events occurred which made it clearly for his benefit to repudiate the transfer.

Solicitors: Messrs. *Lewis, Munns, Nunn, & Longden;* Messrs. *Harrison, Beal, & Harrison.*

(1) Law Rep. 3 Ch. 458.
(2) Ibid. 459, n.
(3) 24 Beav. 318.
(4) 3 De G. & Sm. 141.

SHARPE *v.* FOY.

L. JJ.
1868
Nov. 11, 13, 14.

Settlement on Female Infant—Wife's Real Estate—Fraud of Married Woman—Notice—Solicitor for Mortgagor and Mortgagee—Concealment—Priority.

In a settlement made on the marriage of a female infant, the husband covenanted that in case his wife attained twenty-one he would concur with her, if she would consent, and would use his utmost endeavours to induce her to concur with him, in settling her real estate. This was never done. In 1862, after the wife had attained her majority, the husband and wife mortgaged the wife's real estate to secure money advanced to the husband. The mortgagee was informed by the husband and wife that there was no settlement, and although the person who acted as solicitor for both parties was aware of its existence, he concealed it with the acquiescence of the husband and wife from the mortgagee. In 1865 the mortgagee discovered the existence of the settlement. The mortgage deed, by mistake, was not effectually acknowledged by the wife till after the mortgagee had received notice of the settlement:—

Held, on a bill filed by the mortgagee, that in the face of the evidence of concealment the mortgagee was not affected by notice to the person who acted as his solicitor:

That although the wife's estate did not pass to the mortgagee till after he had received notice of the settlement, yet the misrepresentations of the wife constituted a fraud, which bound her estate, and prevented her from disappointing the mortgagee, and, consequently, the mortgagee had priority over the persons interested under the settlement.

Decree of *Stuart*, V.C. affirmed.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*. The facts were as follows:—By an indenture, dated the 12th of June, 1848, being the settlement made on the marriage of the Rev. *W. H. Foy* with *Eleanor Hannah*, his wife, then an infant, certain sums of stock were assigned to trustees upon trust for the benefit of Mr. and Mrs. *Foy* and the issue of the marriage. In the deed was contained a covenant by Mr. *Foy* with the trustees, that in case Mrs. *Foy* should live to attain the age of twenty-one years he would immediately, or as soon as conveniently might be after she should attain that age, at the cost of the trust estate, "join and concur with her, if she would consent, and also would use his utmost endeavours to induce her to join and concur with him, in such good and sufficient conveyances and assurances in the law as the trustees and trustee for the time being of the deed should require," for conveying to them certain real estate belonging to

L. JJ. 1868 SHARPE v. FOY.

Mrs. *Foy* upon trust for sale, and for the application of the proceeds upon trusts similar to those declared of the sums of stock therein comprised.

Mrs. *Foy* attained the age of twenty-one, but no conveyance of the real estate was ever made to the trustees.

By a deed, dated the 30th of April, 1862, Mr. and Mrs. *Foy* joined in conveying the real estate by way of mortgage to the Plaintiff, *George Joseph Sharpe*, for securing £200 advanced to Mr. *Foy*. The Plaintiff alleged that at the time of advancing his money he had no notice of the settlement, and that he discovered its existence for the first time in October, 1865. In the same month he gave notice of his mortgage to the trustees of the settlement. It appeared that the mortgage had been negotiated and prepared by a Mr. *Clark*, a solicitor's clerk, who appeared to have acted for both parties, and that the deed, shortly after its execution, was duly acknowledged by Mrs. *Foy* before Mr. Justice *Vaughan Williams*. The certificate of this acknowledgment was, however, never filed in the Court of Common Pleas, in consequence of the sudden death of Mr. *Clark*. This omission was not discovered till January, 1867, and an application was then made to the Court of Common Pleas to authorize Sir *E. Vaughan Williams*, who had in the meantime retired from the bench, to sign a new certificate with a view to its being filed. This application was refused (see *In re a Married Woman* (1)). Mrs. *Foy* therefore, on the 18th of June, 1867, after the institution of the present suit, made a fresh acknowledgment of the deed, the certificate of which was duly filed.

The bill was filed against Mr. and Mrs. *Foy*, the trustees of the settlement, and the infant children of the marriage, praying for a declaration that the mortgage had priority over the settlement, and for foreclosure.

Mr. and Mrs. *Foy* put in a joint answer, in which they made the following statement:—

"One Mr. *Clark*, who was then a clerk in the employ of Messrs. *Oliverson, Peachey, & Co.*, attorneys and solicitors, acted as the solicitor or legal adviser of the Plaintiff in the negotiation for the mortgage mentioned in the said bill, and we informed him of the said settlement, and of the effect of the second *testatum* contained

(1) Law Rep. 2 C. P. 510.

therein, and handed him a copy thereof, together with an opinion of one of Her Majesty's counsel upon a case submitted to him by the Defendant, *William Henry Foy*, as to the right of these Defendants to mortgage the said share of this Defendant, *Eleanor Hannah Foy*, and the said Mr. *Clark* retained the said opinion in his possession. He said, however, that he should not tell the Plaintiff of the said settlement, as it might make him nervous, and cause him to hesitate about advancing his money. We are not aware whether the said Mr. *Clark* had been admitted to practise as an attorney and solicitor at the time when he negotiated for the said mortgage. He did not complete the transaction, and he is since dead."

Mrs. *Foy* also stated that she had never consented to a conveyance of the mortgaged property to the trustees of the settlement, though they had more than once urged her to concur in such a conveyance.

The Plaintiff made an affidavit, in which he stated that he agreed to advance the £200 upon the assurance of Mr. *Foy* that he and his wife had an undoubted right to mortgage the property in question, and that it was neither settled nor incumbered, that upon having a proper mortgage executed, he, on the 7th of December, 1861, advanced Mr. *Foy* £50 on account of the loan, and he went on to say :—" I afterwards saw the Defendant *W. H. Foy*, and his wife, several times in reference to the said intended loan, and they distinctly informed me that their interest in the said premises had in no way been settled, assigned, charged, or incumbered. I subsequently referred the Defendants, *W. H. Foy* and his wife, to a Mr. *Clark*, who acted as my solicitor in the matter, but has since died, and who, I believe, prepared the said mortgage deed, and placed it in the hands of Mr. *James Price*, as the solicitor for the Defendants *W. H. Foy* and wife, for their execution and its acknowledgment by the latter. I never heard or was informed by the said Mr. *Clark* or Mr. *Price*, or by any other person whatever, of the existence of any settlement or document affecting the security contained in the said mortgage deed, and I believe that my solicitor, Mr. *Clark* (now deceased), could not have been aware of it, as he never communicated anything to me respecting anything of the kind." In reply to this Mr. and

L. JJ. 1868 SHARPE v. FOY.

Mrs. *Foy* made an affidavit, in which Mr. *Foy* deposed:—"I may have stated to the Plaintiff, as mentioned by him in his affidavit, that the property therein referred to was not affected by any settlement, although I have no recollection of having had any communication with him on the subject of the title to the said property;" and in the same affidavit Mr. and Mrs. *Foy* jointly deposed:—"Mr. *James Price* did not act as our solicitor. We had no solicitor in the matter of the mortgage of the said property. Mr. *Clark* acted for both parties, the Plaintiff stating that one solicitor could so act, and thus save expense to us."

The Vice-Chancellor was of opinion that the covenant being that of the husband alone, the wife had power to deal with her estate as she pleased, and that it was well vested in the mortgagee. His Honour therefore granted the relief prayed, and from this decision the trustees and the infant Defendants appealed.

Mr. *Rodwell*, for the infant Defendants:—

Although a female infant is not bound by a covenant before marriage to settle her real estate, yet the conscience of her husband is bound not to aid her in defeating it; and he will be precluded from concurring with her in any act inconsistent with the settlement: *Durnford* v. *Lane* (1); *Milner* v. *Lord Harewood* (2); *Pimm* v. *Insall* (3).

In the present case, the mortgagee had notice of the settlement. He had constructive notice through his agent Mr. *Clark*, who was informed of its existence by Mr. *Foy;* and he had express notice in 1865, before the acknowledgment of the mortgage deed by Mrs. *Foy;* for the previous acknowledgment was ineffectual: *Jolly* v. *Handcock* (4). Until this acknowledgment no estate passed to the mortgagee. Nor until that time had he any equity against Mrs. *Foy;* for the money was not advanced to her, nor was she capable of making a contract with him: *Field* v. *Moore* (5).

Mr. *Dickinson*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

The words of the covenant in this case are peculiar. It is not a covenant to settle at all events; but a covenant that if the wife

(1) 1 Bro. C. C. 106.
(2) 18 Ves. 259.
(3) 1 Mac. & G. 449.
(4) 7 Ex. 820.
(5) 7 D. M. & G. 691, 718.

consents to settle, the husband will concur. The wife, therefore, was free to refuse to settle, and the husband was then absolved from his obligation, and could join her in any other disposition. Notice before the execution of the deed is immaterial, provided the purchaser has no notice before he advances his money. That was the case here. The Plaintiff was expressly told by *Foy* that there was no incumbrance on the estate, and although *Clark* was informed of it, he wilfully concealed it from the Plaintiff. The doctrine of constructive notice, therefore, does not apply: *Hewitt* v. *Loosemore* (1); *Jones* v. *Smith* (2).

The conduct of Mrs. *Foy* amounts to a fraud. A married woman is capable of committing a fraud, and her interest is bound by her representations. She cannot now give her consent to the settlement: *Savage* v. *Foster* (3).

Mr. *Greene*, Q.C., Mr. *Karslake*, Q.C., Mr. *Woodroffe*, and Mr. *Jervis*, for other parties.

Mr. *Rodwell*, in reply.

SIR W. PAGE WOOD, L.J.:—

If the question whether this mortgage could be sustained had turned merely on the difference between the wording of the covenant in this settlement and that of the covenants in the cases which have been referred to, I should have been inclined to think the mortgage invalid, the principle being that the husband is not at liberty to concur in any act for defeating a settlement by which he is bound, though his wife be not. I do not, however, give any concluded opinion on this point, as I do not consider it necessary for the purposes of the present case.

The material questions here turn upon notice and fraud. The Plaintiff's case is, that when he advanced his money he had no notice of the settlement. If he had not, then there is clearly no equity to take away from him the benefit of the legal estate which was afterwards conferred upon him, so far as that estate was conferred upon him by the husband; but as to the legal estate

(1) 9 Hare, 449.
(2) 1 Hare, 43; 1 Ph. 244.
(3) 9 Mod. 35.

L. JJ. 1868 SHARPE v. FOY.

conferred upon him by the wife a singular point arises to which I shall presently advert.

Now, as regards the question of notice at the time when the money was advanced, I am bound to say that, upon the evidence, the mortgagee cannot be fixed with notice. It is true that the Defendants, *Foy* and wife, in their answer, say that they informed *Clark* of the existence of the settlement, and if that were all the Plaintiff would, of course, be affected with notice, but they go on to say that *Clark*, when they gave him the information, said that he should not communicate it to his client as it might make him feel nervous about advancing his money. When he gave that answer, it was the duty of *Foy* and his wife to go further, and communicate with the client himself, and the Court can only treat their not doing so as a conspiracy with *Clark* against his client. It would be an encouragement of fraud to apply the rules of notice, which were established for the safety of mankind, to a transaction like this; it would be sanctioning a scheme to rob a man by colluding with his solicitor. I make these remarks on the assumption that the statements of *Foy* and his wife are to be believed, but were my view of the law applicable to the case different, I should be loth to act upon their unsupported statement against *Clark*, made after his death, when he cannot contradict it. The affidavit of the Plaintiff is clear and distinct that he had personal interviews with *Foy* and his wife, and that they told him the property was unsettled and unincumbered. *Foy* and his wife, by their answer, swear that they had no personal communication with the Plaintiff at all, but *Foy*, in his affidavit, admits that he may have had such communication; his wife says nothing on the subject. After her husband's admission it was incumbent on her to speak, and her silence exposes her to strong observations.

I think it, then, clear that we are bound to hold that the Plaintiff had no notice of the settlement until after the execution of the mortgage deed, upon the execution of which the Plaintiff acquired the legal estate as against the husband.

But there is this singular circumstance in the case as respects the wife's legal estate, that although the deed was acknowledged at the time of the execution, the certificate was not filed, owing to the death of *Clark;* and afterwards it was found necessary to

have it acknowledged again in 1867, and so the wife's legal estate was not conveyed till after the Plaintiff had express notice of the settlement.

But we have here to consider the class of cases, beginning with *Savage* v. *Foster* (1), which establish that a married woman's estate may become bound by her participation in a fraud. It is true that in *Jackson* v. *Hobhouse* (2) Lord *Eldon* expressed a doubt whether the Court would suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. That was a case where there was a settlement by which the wife was expressly restrained from anticipation. But here the same difficulty does not occur. No settlement had been executed. The wife had the absolute estate, subject only to the covenant of the husband. The Plaintiff advanced his money upon the wife's representation that she had the absolute interest. As to the equitable interest, therefore, he had a prior right to those claiming under the settlement to prevent her from disappointing him, and he has now obtained the legal estate. I think the Appellants' case fails, and the appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The first point in this case is, whether the Plaintiff ought to be treated as having had notice of the settlement; and as actual notice is not alleged, this point is narrowed to the question whether the Plaintiff ought to be considered as affected by constructive notice. In *Hewitt* v. *Loosemore* (3), Lord Justice *Turner* (then Vice-Chancellor) described the doctrine of constructive notice as being subject to a well-founded and wholesome limitation; and in that case, after speaking of the presumption upon which constructive notice depends, he says: "I cannot act upon such a presumption in the face of the evidence which the Plaintiff has himself adduced." In the case now before us, the material evidence in favour of the Plaintiff is in my judgment conclusive, and is at least as strong as that upon which the Lord Justice *Turner* relied in *Hewitt* v. *Loosemore*; for the representations stated to have been made to the Plaintiff at and before the time he made his advance

(1) 9 Mod. 35. (2) 2 Mer. 483.
(3) 9 Hare, 449, 455.

L. JJ. 1868 SHARPE v. FOY.

are not denied, and it appears that the person who was at one time employed by both parties in the transaction, but by whom it was not completed, stated that he should not tell the Plaintiff of the settlement, as it might make him nervous, and cause him to hesitate about advancing his money. Under these circumstances, I think that the Plaintiff cannot be considered as affected with constructive or any notice of the settlement in question.

This renders it unnecessary to enter at any length upon some of the questions which have been argued before us; for even if we assume in favour of the Appellants that the true construction of the settlement is that for which they have contended, and that it did operate as a settlement of the property in question, then the declaration made by Mrs. *Foy* to the intended mortgagee, in order to induce him to advance his money, would amount to what is considered fraud in this Court, and fraud which a married woman is capable of committing, and must in this case he taken to have committed; and under those circumstances the principle of the case of *Vaughan* v. *Vanderstegen* (1) would apply to the present case. That principle is concisely stated by the Master of the Rolls in *Hobday* v. *Peters* (2): "This fraud entirely altered the case, and by reason of the fraud her contract might be enforced against her general property if she had any; that is, any property held in trust for her, though not for her separate use."

The Appellants can only claim through Mrs. *Foy*, and their claim is made against the Plaintiff, who must now be considered as being a purchaser for value without notice, having the first equity against Mrs. *Foy* and all persons claiming under her, and having the legal estate.

Solicitor for the Plaintiff: Mr. *F. Hatton.*

Solicitors for the Defendants: Mr. *F. Norris;* Messrs. *Dubois & Maynard;* Messrs. *Treherne & Wolferstan;* Mr. *W. Phillips.*

(1) 2 Drew. 408. (2) 28 Beav. 354, 360.

In re LEE, A SOLICITOR. *Ex parte* NEVILLE.

L. JJ.
1868
Nov. 12.

Solicitor—Cash Account—Duty to keep Accounts.

L. acted as solicitor for *N.* in various matters, and particularly in raising money for him on mortgages and bills of exchange. He also acted as receiver of *N.'s* rents. The course as to the transactions for raising money appeared to have been, that on each occasion *L.* received the money, retained out of it a sum agreed upon for his costs of that transaction, and handed over the balance. The rents which he received were all duly accounted for, and accounts settled, not including any items for costs. After the death of the solicitor a large bill of costs was sent in, which was referred for taxation. The Taxing Master required a cash account, but no sufficient materials existed for making it out, and the Taxing Master certified that nothing was due to the solicitor, inasmuch as he had received large sums of money, of his disposal of which no account was furnished:—

Held (affirming the decision of the Master of the Rolls), that the bill of costs as taxed must be paid, for that the principle of *White* v. *Lady Lincoln* (1) did not apply where the solicitor was not the general agent of the client, so as to be able to receive the client's moneys at all times without his knowledge, but only received money for him in respect of separate transactions of which the client was aware at the time, and knew what was to be received.

THIS was an appeal by Mr. *Neville* from an order of the Master of the Rolls for payment of a bill of costs to the executors of *Thomas Mann Lee.*

Lee had been employed by *Neville* as his solicitor generally, and particularly in numerous transactions for raising money by mortgages, and by bills of exchange. He also received *Neville's* rents, for which no percentage was allowed him, but *Neville* paid him from time to time a remuneration for his services. The general course in the transactions for raising money appeared to have been, that *Lee* received the money and paid over the balance to *Neville,* after retaining a sum agreed upon for his professional charges in the particular transaction. In 1854 there was a settlement of the rent account. *Neville* at that time paid *Lee* a large sum of money for his professional services, and *Lee* gave a receipt in discharge of all costs up to that time. The rent accounts, which never included any professional charges, were settled down to the time of *Lee's* death, which took place in November, 1859.

(1) 8 Ves. 363.

L. JJ.
1868
In re LEE.
Ex parte NEVILLE.

After *Lee's* death, his executor, in July, 1860, sent in a bill of costs, from 1855, amounting to £1862 11*s.* 9*d.* *Neville* obtained the usual order to tax this bill, containing the common directions for the executor to give credit for all sums of money received by him or his testator on *Neville's* account, and directing the Taxing Master to certify the balance. The Taxing Master required a cash account to be brought in. It appeared that *Lee* had kept no books of account except a day-book, and that there were no proper materials for making out an account of his receipts and payments on *Neville's* behalf. The executor brought in a cash account shewing *Neville* debtor to a large amount, but it was found wholly incorrect, and an amended account was brought in with no better result. The Taxing Master found, therefore, that he could not take the cash account. The bill of costs was reduced by *Neville's* proving some parts of it paid, and was ultimately taxed at £748 16*s.* 5*d.* The Taxing Master certified the amount of costs as taxed, but stated that as *Lee* had received large sums of money on account of *Neville*, of which the executor was unable to render any proper account, and the executor had failed to prove that there was anything due from *Neville*, he found that nothing was due.

The executor took objections to this certificate, and ultimately the Master of the Rolls ordered payment of the taxed costs, deducting the costs of taxation. *Neville* appealed.

Mr. *Jessel*, Q.C., and Mr. *Caldecott*, for the Appellant:—

This case is governed by the principle of *White* v. *Lady Lincoln* (1). Where a solicitor has had cash dealings with his client his bill of costs is only an item in the account between them. It is his duty to keep proper accounts, and make out his case by proof: the *onus* is on him. The cash account must be taken under an order for taxation: *Cooper* v. *Ewart* (2); and where, by his negligence, the solicitor has made it impossible to take it, he cannot recover his costs. The circumstances render it extremely improbable that the costs have not been paid.

Mr. *Southgate*, Q.C., and Mr. *Freeling*, for the executor, were not called upon.

(1) 8 Ves. 363. (2) 2 Ph. 362.

L. JJ.
1868
In re LEE.
Ex parte NEVILLE.

SIR W. PAGE WOOD, L.J.:—

This appeal is founded on the case of *White* v. *Lady Lincoln* (1), which does not appear to us to be applicable to the case before us. We take the facts to be as they appear in the certificate of the experienced and able Taxing Master to whom the taxation was referred. A large bill of costs was brought in, commencing from the year 1855, but it appeared that a large portion of it had been paid, and the demand was reduced on taxation to £748 16*s.* 5*d.* The Taxing Master finds this amount proper as to *quantum* of charge, but, under the circumstances, was of opinion that it should not be allowed, or, in other words, ought to be assumed to have been paid. The solicitor had been employed by Mr. *Neville* as solicitor, and also as receiver of his rents, and if no account of the rents had been rendered, the case would have come nearer to *White* v. *Lady Lincoln.* He was also employed in specific operations for raising money on mortgage and by discounting bills, and the usual course was, that when a bill was discounted the solicitor received the money, and the account was settled there and then, the solicitor retaining his remuneration in respect of that particular transaction, and handing over the balance to the client. A similar course was taken as to the mortgage transactions. The circumstances in *White* v. *Lady Lincoln* were quite different. Lord *Eldon* there pointedly rests his judgment on *Jackson's* being the Duke's general agent, bound in duty to him to keep regular accounts of his money transactions, and the same principle is indicated in Lord *Rosslyn's* previous order. The principle is founded on this, that, when you employ a man as general agent, he can receive money to an amount which you have no means of finding out unless he keeps regular accounts of his receipts and payments. So here, if no account of the rents had been furnished, *Lee* must have been charged with the full amount of the rental, and would have had to discharge himself. But the case is very different when a solicitor is employed to raise money on mortgage, or by discounting a bill. The client there is aware of the whole transaction, and knows what the solicitor receives. The question then is, whether the solicitor is to be deprived of his costs because he did not keep a cash account of sums thus received, from which it was the usual course of dealing between

(1) 8 Ves. 363.

L. JJ. 1868 *In re* LEE. *Ex parte* NEVILLE.

the parties that his costs of the particular transactions should be deducted at the time, and the balance handed over. I think that there is no ground for the contention that in such a case the *onus* is thrown on the solicitor to shew that his costs in respect of other matters have not been paid.

It was urged then that, as a matter of evidence, it ought to be presumed that the costs had been paid, but I do not see any sufficient reason for coming to such a conclusion. In 1854 there was a complete settlement of the rent account, and nothing was included for law expenses; but it is an undisputed fact that law business had been done, and to such amount that Mr. *Neville* gave *Lee* above £1000 for it. This shews that, concurrently with the account then settled, there was a running account for professional charges, and it is clear from the documents produced that other business was done than what was paid for at the time out of the proceeds of the transactions to which it related. The circumstances of Mr. *Neville* shew that there was likely to be a large amount of law business done afterwards. The question is, whether, in these circumstances, a solicitor, because he has gone on not putting down every sum which he receives, is to have it presumed against him that his costs have been paid. It was pressed upon us that, but for Mr. *Neville's* having kept some vouchers, he would have had to pay over again a large part of the costs which he had already paid. That is nothing more than we are all liable to if we do not keep receipts for articles supplied by tradesmen. For any one engaged in business not to keep accounts is blameable, but it is not a breach of duty towards another person such as ought, in the absence of actual fraud, to be visited with the consequences of fraud, unless the party omitting to keep them stands in the relation of general agent to the other.

SIR C. J. SELWYN, L.J.:—

To see whether the case of *White* v. *Lady Lincoln* (1) applies, we must look at the nature of the employment of the solicitor, and it is clear, from Mr. *Neville's* own evidence, that *Lee* received rents for Mr. *Neville*, and also received moneys in respect of separate transactions on mortgages and bills, but was not his general agent.

(1) 8 Ves. 363.

L. JJ. 1868 *In re* LEE. *Ex parte* NEVILLE.

No regular bills of costs were delivered as to these transactions, but sums for costs were deducted from the moneys raised. It is admitted that there was a settlement of accounts in April, 1854, which appears to have been on a similar footing, a sum having been paid for costs without the delivery of any bill; but, looking at the receipt, the payment evidently was only in discharge of costs up to that time. It is clear, then, that the course was not to settle the costs for general professional business at the times when the costs of particular transactions for raising money were settled. A rent account was carefully settled in 1854, and the balance paid, the account not including any professional charges, though it is clear that professional business had been done. No presumption that such business has been paid for can be raised from Mr. *Neville's* vague affidavit that he paid various sums on account of costs, not specifying when, nor shewing any reason why he cannot prove the amounts.

Solicitors: Mr. *Mayhew;* Messrs. *Torr, Janeway, & Tagart.*

L. JJ. 1868 *Nov.* 10.

Ex parte SQUIRE. *In re* GOULDWELL.

Evidence—Act of Bankruptcy—Unstamped and unregistered Creditors' Deed.

An assignment of the whole of a debtor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, though unstamped, and not registered under the *Bankruptcy Act*, 1861.

Ponsford v. *Walton* (1) followed.

THIS was an appeal from a decision of the Judge of the County Court at *Beverley*, refusing to annul an adjudication in bankruptcy in his Court.

On the 30th of June, 1868, *Gouldwell* assigned all his property to *John Blyth* by a deed in the form of schedule D. to the *Bankruptcy Act*, 1861. This deed was never stamped or registered.

On the 8th of July, *Squire*, who was a creditor of *Gouldwell*, filed a petition for adjudication of bankruptcy against him in the

(1) Law Rep. 3 C. P. 167.

L. JJ.
1868
Ex parte SQUIRE.
In re GOULDWELL.

Leeds District Court, proceeding on the execution of the above deed as an act of bankruptcy; and on the following day, the 9th of July, *Gouldwell* was adjudicated bankrupt.

On the same 9th of July, but at an earlier hour in the day, *Gouldwell* was made bankrupt on his own application to the County Court at *Beverley*.

On the 21st of August, the County Court Judge refused an application to annul the County Court adjudication, being of opinion that as the deed of assignment had not been stamped or registered, it was not admissible in evidence as an act of bankruptcy, and that the *Leeds* adjudication, therefore, was invalid.

Squire, who was assignee under the *Leeds* bankruptcy, appealed.

Mr. *De Gex*, Q.C., for the Appellant:—

An adjudication on the bankrupt's own application ought to be set aside in favour of one on the application of a creditor, which is more advantageous to creditors, as it relates back and will defeat the deed of assignment. The adjudication before the Commissioner was good, for the unstamped and unregistered deed is admissible in evidence for the purpose of treating it as an act of bankruptcy: *Ex parte Wensley* (1); *Ex parte Potter* (2); *Ponsford* v. *Walton* (3).

Mr. *Jemmett*, *contrà*.

SIR W. PAGE WOOD, L.J.:—

The Court has an inclination in favour of any reasonable application by creditors to substitute an adjudication on the petition of a creditor for one on the bankrupt's own application. Here we have not any considerable creditor who wishes matters to proceed under the bankrupt's own adjudication; and unless there is some objection to the adjudication in the Court of Bankruptcy it ought to prevail. If we saw any good reason for supposing it invalid, we should not interfere in the way now asked. But we entertain a strong opinion that the decision in *Ponsford* v. *Walton* ought to be followed. It proceeds on this ground, that an unstamped deed passes the estate, and although, until stamped, it cannot be received in evidence for

(1) 1 D. J. & S. 273. (2) 13 W. R. 189.
(3) Law Rep. 3 C. P. 167.

L. JJ.
1868
Ex parte SQUIRE.
In re GOULDWELL.

the purpose of giving it effect, or supporting any claim under it, and the Court is bound to take notice of its being unstamped even if the objection is not taken by the parties, yet it may be admitted in evidence to shew that the grantor has committed a fraudulent act; the object of the person who produces the deed not being to give it effect or shew it to be a good deed.

SIR C. J. SELWYN, L.J.:—

I agree, for the reasons stated by the Lord Justice, that there is no reason for supposing the *Leeds* adjudication invalid.

The question which of the two adjudications ought to stand therefore turns on the question of convenience: *Ex parte Layton* (1). The balance of convenience in the present case is plainly in favour of the Appellant, as the deed of assignment can be set aside under the creditors' adjudication, and not under the other; and the relation back of the adjudication may be a great advantage to the creditors.

Solicitors: Messrs. *Paterson, Snow, & Burney;* Messrs. *Lambert & Son.*

Ex parte ENGLISH AND AMERICAN BANK. *In re* FRASER, TRENHOLM, & CO.

L. JJ.
1868
Nov. 13.

Bankruptcy—Creditors' Deed—Proof—Secured Creditor—Security belonging to the Bankrupt and a Third Person.

A firm in *Charleston* applied to a firm in *Liverpool* to raise the necessary funds for the purchase of cotton in *America* for sale in *England*, at the risk of certain speculators for whom they acted, and the *Liverpool* firm applied to an English bank for an advance for that purpose. An arrangement was accordingly made, under which the *Charleston* firm drew upon an American branch of the bank for the amount required, purchased the cotton, consigned it to the *Liverpool* firm, drew bills upon that firm, and indorsed them to the bank. At the same time the cotton was consigned to the *Liverpool* firm, who accepted the bills drawn upon them by the *Charleston* firm, and the bills of lading were indorsed by the *Charleston* firm to the bank as security for their advance. Afterwards the *Liverpool* and *Charleston* firms became

(1) 6 Ves. 434.

BIBL. LONDIN BRIV.

L. JJ.
1868
Ex parte English and American Bank.
In re Fraser, Trenholm, and Co.

insolvent. The value of the cotton was insufficient to cover the acceptances of the *Liverpool* firm :—

Held, that the transaction was a joint adventure of the *Charleston* and *Liverpool* firms, and that they were jointly interested in the cotton, and consequently that the bank could prove against the estate of the *Liverpool* firm for the sum advanced without giving up their security.

THIS was an appeal from a decision of Mr. Registrar *Thring*, sitting as Deputy Commissioner of the *Liverpool* District Court of Bankruptcy.

In March, 1867, *Fraser, Trenholm, & Co.* were extensive merchants at *Liverpool*, and *John Fraser & Co.* were their agents and correspondents in *Charleston* in *America;* but the two firms, although partly composed of the same partners, were separate and distinct.

About that time certain persons in *America*, who were speculating in cotton, applied to the firm in *Charleston* to purchase cotton for sale in *England*, at the risk, and for the profit, of the speculators; and the *Charleston* firm instructed the *Liverpool* firm to raise the necessary funds.

The *Liverpool* firm accordingly applied to the *English and American Bank* for a letter of credit on their agents in *New York*, in favour of the *Charleston* firm, to the extent of £50,000, to be used in the purchase of cotton to be shipped to the *Liverpool* firm, but the bills of lading to be indorsed to the bank; and the *Liverpool* firm were to accept drafts of the *Charleston* firm to the same amount, which were also to be indorsed to the bank in *London*, to meet the drafts upon the bank.

The bank agreed to this proposal, and gave a letter of credit upon their branch in *New York*, in the following terms :—

"*London*, 26th March, 1867.

"To the *English and American Bank, Limited, New York.*

"Gentlemen,—We hereby authorize Messrs. *John Fraser & Co.*, of *Charleston*, to draw on you at short for account of Messrs. *Fraser, Trenholm, & Co.*, of *Liverpool*, for any sum not exceeding in all the sum of £50,000 sterling, or the equivalent thereof in *United States* gold coin or current funds, for the invoice cost of cotton to be purchased for account of whom it may concern, and to be shipped to *Liverpool.*

"The bills must be drawn in *Charleston* prior to the 1st day of

October, 1867, and advice thereof given to you by telegraph, and also by letter, accompanied by bills of lading filled up to order of the shipper, and blank indorsed, with abstract of invoice thereon for the property shipped as above, together with the drafts of Messrs. *John Fraser & Co.* upon Messrs. *Fraser, Trenholm, & Co.*, payable in *London* at fifty-five days' sight, for the sum so advised in its equivalent in sterling to be indorsed thereon by you.

"All the bills of lading issued, except one retained by the captain of the vessel, to be forwarded direct to you upon the completion of shipments, but within one month from the date of the drafts.

"And we do hereby agree with the drawers, indorsers, and *bonâ fide* holders of bills drawn in compliance with the terms of this credit, that the same shall be duly honoured on presentation at your office in *New York*.

"We are, &c.,

"The *English and American Bank, Limited*,

"by *S. Gray*, Manager.

"*N.B.*—Insurance to be effected by Messrs. *Fraser, Trenholm, & Co.*, at *Liverpool*."

Fraser, Trenholm, & Co., at the same time addressed the following letter to the bank:—

"*Liverpool*, 27th March, 1867.

"Gentlemen,—Having received from you the letter of credit, of which a copy is annexed, we hereby agree to its terms, and in consideration thereof, and of your accepting the drafts drawn in terms thereof, we bind ourselves to accept on presentation the drafts of Messrs. *John Fraser & Co.*, payable in *London* at fifty-five days' sight, upon us for the amounts of the drafts drawn by them under the said credit upon your *New York* house, and to pay the same at or before maturity, but only upon condition that the drafts upon us shall not be negotiated, but shall be held against your acceptances and collateral securities in your possession, and we hereby give you a specific claim and lien on all goods, and the proceeds thereof, in respect of which you may, in *London* or *New York*, make any advances or come under any engagement under the said credit, on all policies of insurance on such goods, and on all bills of lading given therefor, with full power and authority to

L. JJ.
1868
Ex parte English and American Bank.
In re Fraser, Trenholm, and Co.

take possession and dispose of the same at discretion, unless on application we furnish you with other security satisfactory to you.

"We further agree that, in the case of drafts drawn upon us in the gold or current funds of the *United States of America*, we shall pay the same in sterling at your rate in *New York* for the fifty-five days' sight bills at the time your manager there shall provide for the bills drawn under the said credit, and as indorsed by him on the drafts upon us herein referred to.

"The marine insurance is to be done by us in *Liverpool*, and the policies deposited with you, and your charge for commission is to be 1 per cent.—We are, &c.,

"*Fraser, Trenholm, & Co.*"

In pursuance of this arrangement the *Charleston* firm drew on the branch of the *English and American Bank* at *New York* for £50,000, and handed to them drafts on the *Liverpool* firm to that amount, which were afterwards duly accepted, and at the same time indorsed to them bills of lading for 2761 bales of cotton. Before the bills became due the *Liverpool* firm stopped payment, and their estate was wound up under an inspectorship deed registered under the *Bankruptcy Act*, 1861. Shortly afterwards the *Charleston* firm also failed, and their estate was wound up under the insolvent laws of *South Carolina*. There was no conflict between the English and American law upon the subject now in dispute. The cotton was sold by mutual arrangement, and produced less than the amount of the bills.

The *British and American Bank* claimed to prove against the estate of the *Liverpool* firm of *Fraser, Trenholm, & Co.* for the full amount of the debt of £50,000, without bringing the amount of their security into account, on the ground that the cotton pledged to them was not the sole property of the *Liverpool* firm.

The Registrar was of opinion that the *Liverpool* firm had, in substance, the sole property in the cotton, and, consequently, that the *English and American Bank* could not prove for the debt against their estate without bringing the amount of their security into account. The bank appealed from this decision.

An affidavit was filed on behalf of the Respondents by *C. K. Prioleau*, a member of the *Liverpool* firm, which made the following statements:—"The 2761 bales of cotton were purchased by

John Fraser & Co. on behalf of themselves and my firm of *Fraser, Trenholm, & Co.*, but by the instructions and at the risk of the firms and persons, and in the proportions following:"—He then set out a table of the bales of cotton, with the names of the persons by whose instructions they were shipped, and proceeded:—"None of the last-mentioned firms or persons were the owners of, or gave any consideration for, the said cotton. The consideration for it was fully paid by the said firms of *J. Fraser & Co.* and *Fraser, Trenholm, & Co.* The bills of lading were forwarded by the *New York* branch of the said bank to the manager of the said bank at *Liverpool.* In the ordinary course of business the bills would have been paid by my said firm of *Fraser, Trenholm, & Co.*, and the bank would thereupon have handed over the bills of lading to my said firm, my said firm would then have sold the cotton, and, after deducting the amount paid on the bills, and allowances, commission and expenses in respect of the cotton, would have paid the profits to, or received the loss on the said transaction from, the said firms and persons at whose risk the cotton was bought; and I say that the said firms and persons had no other interest in the cotton than that they were entitled to receive the profit, and liable to make good the loss, on the purchase and sale thereof."

"The said firms of *John Fraser & Co.* and *Fraser, Trenholm, & Co.* had paid for the said cotton, and had respectively a right to pledge the same against the firms and persons at whose risk it had been purchased, as aforesaid, to the full value thereof, to secure the repayment of the purchase-money of the said cotton, and their commission and expenses, and also by way of indemnity against the acceptance of the drafts aforesaid."

Mr. *W. F. Robinson*, and Mr. *Cohen* (of the Common Law Bar), for the Appellants:—

The rule is well established in Bankruptcy, that a creditor who has a security from a third person, or a security which belongs jointly to the bankrupt and a third person, can prove for the whole debt without giving up his security: *Ex parte Parr* (1); *Ex parte Shepherd* (2); *Ex parte Turney* (3); *In re Plummer* (4). In the present case the cotton was not the sole property of the *Liverpool*

(1) 1 Rose, 76.
(2) 2 M. D. & D. 204.
(3) 3 M. D. & D. 576.
(4) 1 Ph. 56.

L. JJ. 1868

Ex parte English and American Bank.

In re Fraser, Trenholm, and Co.

firm. The transaction was a joint adventure of the *Charleston* and *Liverpool* firms, and the cotton belonged to them jointly, subject to the rights of the original speculators, who might at any time have paid the price and commission, and redeemed the cotton. This appears from the affidavit of Mr. *Prioleau* filed on behalf of the Respondents.

Mr. *De Gex*, Q.C., for the trustees of *Fraser, Trenholm, & Co.*:—

The statement in the affidavit of Mr. *Prioleau* relied upon by the Appellants, must be taken in connection with the undisputed facts of the case as appearing on the rest of that affidavit and the other evidence. The purchase-money was paid by the *Charleston* and *Liverpool* firms only in the sense of its having been raised by means of the bills drawn by one firm and accepted by the other. There was no money or other consideration belonging to the two firms which passed to the vendors of the cotton. There was no partnership between the firms, nor was there a single joint creditor of the two; so that even on that ground the application of the authority of *In re Plummer* (1) (if otherwise applicable, as it clearly is not) would be excluded. Nor is there any pretence for saying that the cotton was joint property. It was purchased and paid for by the *Charleston* firm, who consigned it to the *Liverpool* firm for sale, and drew upon that firm against the proceeds, on which, of course, the *Liverpool* firm were entitled to a lien for their indemnity against their acceptances. That there were speculators behind the *Charleston* firm, to whom that firm might have to account, or that there were, on the other hand, prior incumbrancers, like the Appellants, whose charge overrode every other, makes no difference as to the title to the cotton subject to that prior charge. The criterion is, whether, if the debt were paid by the bankrupt's estate, the mortgaged property would belong to that estate against which the proof is tendered: *Ex parte Turney* (2). Here, if the Appellants were paid off by the *Liverpool* firm, the cotton would at least have belonged to that firm as a security for repaying to them the amount of their acceptances; and as this amount exceeded the value of the cotton, their property in it was absolute. The transaction was simply this:—The *Charleston* firm

(1) 1 Ph. 56. (2) 3 M. D. & D. 576.

drew bills upon the *Liverpool* firm, and mortgaged the cotton to them to cover their acceptances and the commission, and the *Liverpool* firm sub-mortgaged their security to the bank to meet the bills drawn on the bank by the *Charleston* firm under the letter of credit. And as the cotton was mortgaged to the *Liverpool* firm for more than its value, no one had any interest in it behind that firm. Even if the two firms had (which they had not) a joint interest in the cotton, that joint interest would be subject to the exhaustive antecedent charge or lien of the *Liverpool* firm as an indemnity, and would be as immaterial as any other posterior interest. The result is, that the bank had, by express contract, the same equity against the cotton which the bill-holders had without express contract in *Ex parte Waring* (1), and it therefore is important to see how Lord *Eldon* deals with the proof in that case. The terms of the order drawn up by his direction are set out in the note to *Powles* v. *Hargreaves* (2), and from them it appears that the proofs which had been admitted against the estates both of the drawers and the acceptors, were in each instance reduced by the amount of the proceeds of the securities.

Mr. *Benjamin*, on the same side:—

The speculators in *America*, at whose risk the cotton was purchased, were not the owners of the cotton when purchased. They did not buy it, they never had it, nor could they in any way have recovered it. The *Charleston* firm entered into the contracts for purchase, but were unable to carry this contract out themselves, and made a sub-contract with the *Liverpool* firm that upon that firm finding the purchase-money the cotton, when bought, should be consigned to them. The *Liverpool* firm, therefore, had the sole property in the chattel. They were able to pledge it without the consent of the *Charleston* firm, and might have redeemed it without any communication with them. If the trustees of the *Liverpool* firm had paid the amount in full to the bank, the cotton would have belonged to the estate of that firm, and to no other: *Halliday* v. *Holgate* (3); *Lindley* on Partnership (4).

Mr. *W. F. Robinson*, in reply.

(1) 19 Ves. 345.
(2) 3 D. M. & G. 445, n. 1863.
(3) Law Rep. 3 Ex. 299.
(4) Page 1163.

L. JJ.
1868
Ex parte ENGLISH AND AMERICAN BANK.
In re FRASER, TRENHOLM, AND CO.

SIR W. PAGE WOOD, L.J.:—

The arguments which have been addressed to us have been very ingenious, but are not in accordance with the facts, which are extremely simple.

The question is, who are the persons interested in this cotton? If it is not the bankrupts alone, the bankrupts being jointly interested with one or more other persons, it is agreed that the creditors would be entitled to prove without giving up the value of the security. The state of the case is this, and I am content to take it on the affidavit of Mr. *Prioleau*, the letter of credit, and the arrangement set out in the petition. It appears that certain speculators gave orders to an *American* house to buy cotton for them, and to sell it for them, the speculators to have the surplus, if any, and engaging to pay the deficiency if it should be sold at a loss. That makes it the property of those who gave the order. The effect of what they do is this—they employ an agent, who advances the price for them, but he only advances it by way of charge, not by way of making himself the owner, he being entitled to demand of his principal the difference in case of any deficiency; and if there is any surplus he is to hand it over to his principals because it is their cotton. Mr. *Prioleau* states it exactly in that way in his affidavit. [His Lordship read the passage in the affidavit stated above, and continued:—] That is really the whole of the case. The *American* and *Liverpool* firm together, as co-adventurers, enter into this speculation on behalf of the purchasers, and the *American* firm and the *Liverpool* firm enter into an arrangement by which the *Liverpool* firm undertakes to find the money, and the *American* and *Liverpool* firms pledge the cotton and all their interest in it, namely, an interest by which they are entitled to sell the property, and to pay the commission due to themselves jointly, and hold any surplus for the original speculators.

That brings the case within those where the thing pledged is not the property of the bankrupt alone, but the property of the bankrupt and some other person, and in such circumstances the creditor may make his proof without deducting the value of his security. It seems to us, therefore, that the learned Registrar's decision is wrong, and that the bank are entitled to prove against the bankrupts' estate without deducting the value of their security.

SIR C. J. SELWYN, L.J.:—

L. JJ.
1868
Ex parte ENGLISH AND AMERICAN BANK.
In re FRASER, TRENHOLM, AND CO.

The persons under whose instructions the cotton was shipped must, in my judgment, be taken to be the purchasers of the cotton in question. It was not, and cannot be, denied that they could at any time have obtained possession of the cotton by paying the price and the commission due on it. I avoid the use of the contested word "property," but these purchasers clearly have an interest as owners of the cotton. If payment be necessary to constitute what is called "property," then *Fraser, Trenholm, & Co.* have never made any payment, but the cotton has been paid for by the bank. If possession be necessary to constitute what is called "property," then it was part of the original contract that these bills of lading should be delivered to the bank, and they have been delivered to them and retained by them. Then if we refer to the agency or instrumentality by which this arrangement was carried into effect, we find that the bills of lading were delivered to the bank, not by the *Liverpool* house, but by the *American* house, and that, in point of fact, throughout the whole transaction, the intermediate agency has always been the agency of the two firms jointly, and not of the *Liverpool* firm solely.

The only remaining argument is, that the interest of the bank is in the nature of a sub-mortgage of a mortgage. I have already disposed of that when I said that it was part of the terms originally stipulated for by the bank that they should have the possession of the bills of lading which represent the cotton. I agree therefore, that the order must be discharged, but there will be no costs.

Solicitors for the Appellants: Messrs. *Field, Roscoe, & Co.*, for Messrs. *Bateson, Robinson, & Morris, Liverpool.*

Solicitors for the Respondents: Messrs. *Gregory, Rowcliffes, & Rawle*, for Messrs. *Hull, Stone, & Fletcher, Liverpool.*

L. JJ.
1868
Nov. 7.

Ex parte PICKERING. *In re* PICKERING.

Bankruptcy Act, 1861, s. 192—*Companies Act*, 1862, s. 75—*Deed of Arrangement by Contributory—Amount of Debt—Future Calls—Assent of Creditors.*

A contributory of a company in course of winding up executed a deed of arrangement with his creditors, and entered the company as creditors only for a call of £5 per share which had been made. He was liable to be called on for £35 per share more, and calls to that amount were afterwards made. If the company had been entered as creditors for this whole amount, the dissenting creditors would have been the majority in value.

The debtor subsequently alleged a set-off against the calls, which he had not stated on the application for registration :—

Held, that the company ought to have been entered as creditors for the estimated amount of the future calls, as well as the call already made, being the amount proveable in bankruptcy according to the *Companies Act*, 1862, s. 75, that the deed, therefore, was not assented to by the majority required by the *Bankruptcy Act*, 1861, s. 192; and was not binding on a dissentient creditor.

THIS was a motion by a debtor who had executed a creditors' deed to discharge an order of Mr. *Hazlitt*, acting for Mr. Commissioner *Holroyd*, allowing execution to issue notwithstanding the deed.

In June, 1866, M. *Lafitte* commenced an action against *Pickering* on a bill of exchange for £2032. The Defendant pleaded, and the action was tried at the Summer Assizes in 1866, and a verdict entered for the Plaintiff subject to a special case, which was argued in November, 1867, and judgment given for the Plaintiff. On the 19th of February, 1868, the sheriff proceeded to arrest the debtor, but was prevented doing so by the debtor producing his protection under a deed of arrangement dated the 30th of May, 1867.

In this deed the debts were stated to amount to £933,000. The *International Contract Company*, an order for winding up which had been made in July, 1866, was entered as a creditor for £50,725, and as not assenting, this sum being the amount of a call of £5 per share on 10,145 shares. *Pickering* had been owner of that number of shares, but was ultimately, some time after the execution of the arrangement deed, settled as a contributory for

6645 shares only. At the time when the arrangement deed was executed the only unpaid call that had been made was for £5 per share; but the shares being £50 shares on which only £10 per share had been paid, there was a liability to future calls to the amount of £35 per share, and calls to the full amount were actually afterwards made. If the *International Contract Company* had been entered as a creditor for £265,800, the total amount of calls that could be made on the shares, the debts of the assenting creditors, instead of forming the requisite majority in value, would have appeared to fall short of the debts of the dissentients by at least £67,000.

Pickering was examined in May and June, 1868, as to the *Contract Company* being entered as creditors only for the above amount, and did not state anything as to his having a counter claim against the company. In August *Lafitte* applied for leave to issue execution, and *Pickering*, on the 18th of August, made an affidavit in opposition, which was in part as follows:—

"When I executed the deed of arrangement I had a valid and subsisting claim against the *International Contract Company* amounting to £500,229, and I am advised the same is now a debt due to my estate from the company, subject to reduction by the counter-claim of the company against me on shares.

"The said company was, at and prior to the time of my executing my aforesaid deed, and still is, being wound up, and I claim the right of setting off so much of my aforesaid claim as is necessary against the claim of the said company. I was advised to insert the claim of the company, as I did in my list, as follows:—'£50,725, call of £5 per share on 10,145 shares of the company. This is a disputed liability;' but I did not intend thereby to admit that I had no counter claim against the said company, and I say that, in fact, the said company has no claim against me or my estate whatever, but is indebted to my estate in a very large sum.

"I have lodged the aforesaid claim against the said company in the usual and proper way, and the same has not been rejected. The particulars of my said claim appear in the account now produced and shewn to me, marked *A*."

Pickering had, in the course of his examination, explained that

L. JJ. 1868

Ex parte PICKERING. *In re* PICKERING.

when he called the claim of the company a disputed liability, he meant that he disputed being the holder of so many shares.

Mr. *Hazlitt* was of opinion that the deed was invalid for want of the assent of the requisite majority of creditors, and, moreover, that the debtor ought to have pleaded the deed in the action. He accordingly, on the 27th of August, 1868, made an order giving leave to M. *Lafitte* to issue execution.

Mr. *Roxburgh*, Q.C., and Mr. *A. E. Miller*, for the Appellant:—

If the company had been an assenting creditor, and the debtor had entered it as a creditor for the whole amount of calls that could be made, and thus obtained the requisite majority, the deed would have been impeached on the ground that the company was not a creditor to so large an amount. This shews that the whole amount ought not to be entered. The *Bankruptcy Act* was passed before the *Companies Act*, and contains nothing applicable to uncalled-up capital in companies. The debts to be entered must be debts which would support an adjudication in bankruptcy, which this would not; for though, according to *Williams* v. *Harding* (1), it is considered a debt accruing when the shareholder becomes such, it is not payable till a call is made, nor till then is it known that it ever will become payable. We contend, therefore, that though the official liquidator might prove for the estimated amount of the calls to be made, the company ought not to be entered as creditors for that amount. But, at all events, the debt must be reduced by set-off: *In re Duckworth* (2). If the present decision is sustained, no shareholder in a company can ever effectually enter into a deed of arrangement with his creditors.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for *Lafitte*:—

The creditors ought to be entered at the amounts for which they could prove in bankruptcy. Under the *Companies Act*, 1862, s. 75, the proof by the company would be for the estimated amount of all calls: *Williams* v. *Harding* (3). Now, estimating the debt to the company according to this principle, there is not the statutory majority of creditors. There is no sufficient evidence of set-off,

(1) Law Rep. 1 H. L. 9. (2) Law Rep. 2 Ch. 578.
(3) Law Rep. 1 H. L. 9, 29.

and it cannot be allowed, there being a clear debt: *Ex parte Middleton* (1). It is clear from the *Bankruptcy Act*, 1861, s. 200, that but for that section the holder of a bill of exchange which the debtor had indorsed must have been entered as a creditor, which shews that a liability which may never become a debt is within the general words as to debts.

Mr. *Roxburgh*, in reply.

SIR W. PAGE WOOD, L.J.:—

I am of opinion that this debtor has not complied with the provisions of the *Bankruptcy Act*, 1861. The 192nd section makes necessary the assent of a majority in number, representing three-fourths in value, of the creditors whose debts exceed £10, and the proceedings under such a deed are assimilated to those in bankruptcy. The debts in respect of which the creditors are to be bound must be taken as being of the amounts which they would be entitled to prove in bankruptcy. Now, what amount of debt would the official liquidator have been entitled to prove against *Pickering's* estate in bankruptcy? The 75th clause of the *Companies Act*, 1862, contains a clear provision that the liability of a contributory shall be deemed to create a debt accruing due from the time when his liability commenced, and that in case of his bankruptcy proof may be made not only for calls already made, but for the estimated value of his liability to future calls. So here, *Pickering's* debt must be considered to have accrued from the time of his becoming a shareholder. While the concern is a going concern the amount of liability to future calls is incapable of being estimated; but when the company is being wound up this state of things is altered, and the contributory is a debtor for an amount which the Legislature assumes to be capable of being estimated. I think, therefore, that a contributory who executes a deed of arrangement must proceed as if the official liquidator had come in and asked to have the liability estimated, and must enter him as a creditor for the estimated amount of all future calls. That disposes of the case before us. The whole amount of unpaid capital has been required to be called up, and this gentleman, who

(1) 10 L. T. (N. S.) 517.

L. JJ.
1868
Ex parte PICKERING.
In re PICKERING.

was well acquainted with the affairs of the company, must have had reason to believe that such would be the case. He, however made no estimate, but entered the official liquidator as a creditor only for the call which had been already made, and it is only by this course that he can shew the assent of the required majority of creditors. He then, at the last hour, alleges that he is entitled to a set-off of such an amount as to make him a creditor instead of a debtor. I am of opinion that this defence cannot be allowed. It is the duty of a debtor, when entering into an arrangement with his creditors, to make a full and fair disclosure of his affairs, and no attention can, for the present purpose, be paid to a claim of set-off which was kept back from the body of creditors, and never disclosed until it was brought forward to defeat the application of a creditor for leave to issue execution. The appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J. :—

Considering the operation of these trust deeds in binding dissentient creditors, it is obviously necessary that a debtor who executes such a deed shall be held bound to comply strictly with the terms of the Act, and especially that the statement which he is required to make respecting his creditors, and the value of their debts, shall be accurate and true to the full extent of the debtor's means of knowledge. The debtor in the present case was largely concerned with the *International Contract Company*, and must be taken to have known its affairs well. He does not suggest any sudden change in the state of those affairs, and he must have known at the time of his executing this deed that he was sure to be called upon for a large sum in respect of future calls; and under the *Companies Act*, 1862, s. 75, he was to be treated as a debtor for these calls from the time when he took his shares. In this state of things he puts the company down as creditors only for a call of £5 per share which had been already made, without any reference to future calls. If it had been clear that this call would pay all the debts of the company, such a course would have been correct: but he must have known that it would not.

I do not consider that the defect is cured by the debtor's affidavit, in which he, at a late stage of the proceedings, makes

claim of set-off. Such a claim ought to have been brought forward at first, and the affidavit is, moreover, in various particulars vague and insufficient.

L. JJ. 1868 *Ex parte* PICKERING. *In re* PICKERING.

Solicitors: Messrs. *Courtenay & Croome;* Messrs. *Clarke, Son, & Rawlins.*

Ex parte NATIONAL BANK OF ENGLAND. *In re* VAN WART.

L. JJ. 1868 Nov. 14.

Bankruptcy Act, 1861, ss. 199, 200—*Creditors' Deed—Order for Registration not conclusive as to Validity—Refusal to adjudicate.*

A creditor petitioned for adjudication against his debtor. On the following day the debtor gave notice of motion to stay proceedings and dismiss the petition. On the hearing of the motion, the debtor proved a deed registered under the 200th section of the *Bankruptcy Act*, 1861, before the Petition was presented, and an order of a *London* Commissioner allowing it to be registered as complying with the provisions of the Act. The creditor proceeded to examine the debtor as to his creditors, in order to shew that the provisions of sect. 200 had not been complied with, but the examination was stopped on the ground that the order of the *London* Commissioner was conclusive; and an order was made dismissing the petition. The petitioning creditor appealed on the ground that the order was not warranted by sect. 199 of the Act, and on the ground of the examination having been stopped:—

Held, that the Commissioner had jurisdiction to entertain the motion and to dismiss the petition, if satisfied that there was a deed of arrangement which would render an adjudication void:

But *held*, that the case must go back to the Commissioner for the examination of the debtor to proceed, the *ex parte* order of the *London* Commissioner not being conclusive evidence that the deed had been assented to as required by the Act.

THIS was an appeal by the petitioning creditors from an order of Mr. *Yate Lee*, acting as the deputy of Mr. Commissioner *Perry* in the *Liverpool* District Court, dismissing their petition for adjudication.

On the 4th of September, 1868, the debtor, *O. I. Van Wart*, executed a deed between himself and *W. J. Williams* on behalf and with the assent of the undersigned creditors of *Van Wart*, and of him and *W. J. Harris*, whereby, after reciting that *Harris* and *Van Wart* carried on business in partnership, and that *Harris* was

L. JJ. 1868 *Ex parte* National Bank of England. *In re* Van Wart.

recently adjudicated bankrupt, and that the joint estate was wholly insolvent, and that there was no surplus from the private estate of *Harris*, and that nothing was due from *Van Wart* to the separate estate of *Harris*, nor to the joint estate, and that *Van Wart*, being liable for the joint debts, and in possession or having the control of the joint estate for the purpose of liquidation, called the joint creditors together, and it was unanimously resolved that the now stating deed should be made, it was witnessed that "*O. I. Van Wart* hereby conveys all his estate and effects, and all the estate and effects of the said firm, to *W. J. Williams*, to be applied and administered for the benefit of the creditors of *O. I. Van Wart*, and of the creditors of the said firm, in like manner as if *O. I. Van Wart* and *W. J. Harris* had been at the date hereof duly adjudicated bankrupt."

This deed was proceeded with under the *Bankruptcy Act*, 1861, s. 200, the debtor filing an affidavit to shew that he had the requisite majority of assenting creditors, excluding those who were unknown by reason of his not being able to ascertain by whom various bills of exchange were holden, or who were resident abroad. On the 6th of October, 1868, Mr. Commissioner *Bacon* made an order by which, after referring to the deed, the notices required by sect. 200, and the affidavit of *Van Wart* as read, "it appearing that the said *O. I. Van Wart* has obtained the consent to such deed of a majority in number representing three-fourths in value of all the creditors of the said *O. I. Van Wart* and *W. J. Harris*, with the exception of those creditors who are unknown to him by reason of his being unable to ascertain by whom bills of exchange accepted by them were holden, and by reason of the absence of some of their creditors in foreign countries," he allowed the registration of the deed, and directed it to be registered with the Chief Registrar, provided the other conditions in the Act had been complied with to the satisfaction of the Chief Registrar, and on the following day the learned Commissioner made another order allowing the deed to be registered, though *Harris* had not made any affidavit in support of the accounts, or tendered any account of his separate debts. The deed was accordingly registered on the 7th of October.

On the 21st of October, the petitioners filed a petition in the

Liverpool Court for adjudication against *Van Wart*. He, having obtained information of it, gave notice that he should apply for an order that the proceedings under the petition might be stayed, and the petition dismissed. The Commissioner thereupon declined to adjudicate till the motion was disposed of.

On the 29th of October this motion was brought on, and the debtor was examined. The solicitor to the petitioning creditors asked him, "What steps did you take to ascertain the holders of the bills held by the creditors whose assents have been excluded." This question was objected to on the ground that it was not competent to the petitioning creditor to go behind Mr. Commissioner *Bacon's* order. The objection was allowed by Mr. *Lee;* and an order made dismissing the Petition.

Mr. *De Gex*, Q.C., and Mr. *Bardswell*, for the Appellants:—

First: This order can only purport to have been made under sect. 199 of the Act, for apart from that section all the Court could do would be to refuse to adjudicate. But sect. 199 does not apply, being in terms limited to petitions presented in the interval between the execution of the deed and its registration. That is the only case in which such a remedy is wanted; it is wanted there because the registration of a deed does not relate back to its execution: *Stanger* v. *Miller* (1); and an unregistered deed could not be shewn as cause against adjudication. An *ex parte* adjudication is the statutory right of a creditor, and must be made *ex debito justitiæ*: *Ex parte Lanchester* (2); *Backwell's Case* (3). Secondly: This deed does not comply with the provisions of sect. 200. The required certificate by the trustees has not been made. The adoption of the form in Schedule D. is imperative, but the deed materially differs from it, containing recitals importantly affecting the rights of creditors. Thirdly: We were not allowed to enter into evidence that the provisions of the Act had not been complied with. The view that the Commissioner's order is conclusive is quite untenable: *Bramble* v. *Moss* (4); *Ex parte Rawlings* (5); *Ex parte Page* (6); *Ex parte Banfield* (7).

(1) Law Rep. 1 Ex. 58.
(2) 17 Ves. 512.
(3) 1 Vern. 152.
(4) Law Rep. 3 C. P. 458.
(5) 1 D. J. & S. 225.
(6) Ibid. 283, 287.
(7) Law Rep. 1 Ch. 154.

L. JJ.
1868
Ex parte NATIONAL BANK OF ENGLAND.
In re VAN WART.

Their Lordships desired Counsel for the Respondent to confine himself to the objections to the form of the deed, and the not allowing the Appellants to go into evidence.

Mr. *North*, in support of the order :—

Section 65 shews that the schedules to the Act are not given as forms which cannot be in the slightest degree departed from, and this is substantially the same as the form in Schedule D., being an assignment of all the debtor's property to be administered as in bankruptcy without any condition. I contend that there is nothing in the Act to make the recitals estop a creditor who has not executed the deed; nor, indeed, could such recitals take away the rights of the creditors against any separate estate of *Harris*, or against the joint estate. The order of the *London* Commissioner distinguishes this case from all those which have been cited on the question whether registration is conclusive evidence that the provisions of the Act have been complied with. The *London* Commissioner has decided the question.

Sir W. Page Wood, L.J. :—

This case must go back to the Commissioner. I am not influenced by the argument founded on the 199th section of the Act, as I do not think that the order is to be treated as purporting to be made under that section. Mr. *De Gex* contends that it is the right of a creditor to apply *ex parte* for adjudication. But the Commissioner has jurisdiction to refuse to adjudicate if he knows anything which makes an adjudication improper, and if any one informs him of something which would make the adjudication void he is not bound to refuse to hear him. The difference between dismissing the petition and simply refusing to adjudicate is too thin to have any importance attached to it. But if a person comes in to inform the Commissioner of something which prevents the adjudication, he is subject to cross-examination, and so the debtor here was liable to be cross-examined, even if it was not incumbent on him to prove affirmatively that all the statutory requisitions had been complied with, which, on the authorities, it seems it was. The debtor produces a registered deed of arrangement with an order amounting to a certificate that the conditions

of the Act have been complied with. That may be *primâ facie* evidence that they have been complied with, but it cannot be anything more, for the Commissioner can only certify in effect that so far as appears on the materials before him they have been complied with; he has no means of knowing whether every creditor named is not a fictitious one, nor whether the debtor may not know the name of every creditor he has, although he states he does not. The first question asked of the debtor here was about his creditors, and the examination was stopped on the ground that the *London* Commissioner had decided the point. The *London* Commissioner decided nothing, except that the debtor had told him upon oath what, if true, shewed a compliance with the provisions of the statute. As the case must go back to the Commissioner in order that the facts may be properly ascertained, we say nothing as to the form of the deed further than that it raises questions requiring grave consideration.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. As regards Mr. *De Gex's* first point, I assume, for the sake of argument, that he is right in saying that every creditor has, *ex debito justitiæ*, the right of applying *ex parte* for an adjudication in bankruptcy. But the Court of Bankruptcy, like every other Court, may decline to adjudicate, or may suspend its decision and require some one else to be summoned. Here the Commissioner declined to adjudicate till a motion by the debtor to stay proceedings and dismiss the petition had been disposed of. I think he had jurisdiction to do this. But the substantial question is, whether, after taking that course, he was right in stopping the examination of the debtor on the ground that he was estopped by the order of Mr. Commissioner *Bacon*. It is clear on the authorities that an *ex parte* certificate of this kind is not conclusive, and therefore the matter must go back to the Commissioner.

Solicitors for the Appellants: Messrs. *Chester & Urquhart*; Mr. *W. W. Wynne.*

L. JJ.
1868
Nov. 13.

Ex parte BARNETT. *In re* TAYLOR.

Bankruptcy—Omission to choose Creditors' Assignee at First Meeting—Appeal by Creditor whose Proof was not formally complete at Date of Meeting—Proof of Debt by Declaration—Sufficiency of Statement of Account.

Post 357-3-4

Where the first meeting of creditors has passed without the choice of a creditors' assignee, by reason of the majority refusing to nominate any one for election, the Court has power to appoint a fresh meeting to continue the proceedings for the election of an assignee.

A creditor whose debt was not objected to at the meeting for choice of assignees, although not formally proved, may appeal from a decision come to at the meeting, provided his debt be proved before the hearing of the appeal.

If a creditor who proves his debt by declaration under the 144th section of the *Bankruptcy Act*, 1861, files a statement of account which is not "full, true, and complete" his proof ought to be rejected.

THIS was an appeal from an order of the Registrar of the District Court of *Birmingham*.

Joseph Taylor, the bankrupt, on the 3rd of August, 1868, gave a bill of sale of all his effects to *Charles Froggart*, being at that time in insolvent circumstances. *Froggart* took possession of the goods, and kept possession till the 20th of August, when he sold them to the son and son-in-law of the bankrupt.

On the 24th of August *Taylor* was adjudicated bankrupt, and the first meeting of creditors was held on the 9th of September. On that occasion Mr. *Griffin* appeared as solicitor representing *Froggart* and two other creditors, whose debts amounted to £187 8*s.* 7*d.*, of which *Froggart's* claim was £143 9*s.* 6*d.*, and Mr. *Dale* appeared as solicitor representing *J. Barnett*, the Appellant, and ten other creditors, whose total debts amounted to £203 11*s.* 2*d.*, but in consequence of the non-production of a bill of exchange in support of one of the debts, the amount was reduced to £184 2*s.* 2*d.* *Dale* then objected to the reception of *Froggart's* claim on the grounds subsequently stated, but the objection was overruled by the Registrar. The effect of this was, that the creditors represented by *Griffin* had a majority of votes, and were in a position to choose the assignee; but *Griffin* refused to nominate one, preferring to leave the estate in the hands of the official assignee. To this the Registrar assented, although *Dale*, on behalf of the

other creditors, was anxious to have one appointed; and *Griffin* then filed the proofs of his clients' debts. The notice of appeal was given before the second meeting, which was held on the 16th of October. At that meeting *Dale* brought in the debts of his clients, including that of the Appellant, amounting to £203 11*s.* 2*d.*, and the evidence being then completed they were all admitted to proof. It appeared to be the usual custom in the District Court for the party who had been unsuccessful in the choice of an assignee not to file his proofs at the first meeting, but to reserve them for a future meeting. The Appellant now moved before the Court of Appeal that the decision of the Registrar, allowing the proof of *Froggart's* debt and his right to vote in the choice of an assignee, might be reversed, and that there might be a fresh choice of assignees.

The principal ground of objection to *Froggart's* claim was the insufficiency of the statement filed by him.

Mr. *De Gex*, Q.C., and Mr. *Everitt*, for the Appellant:—

The 144th section of the *Bankruptcy Act*, 1861, provides that where a creditor proves his debt by declaration, as was done in *Froggart's* case, the creditor must declare that the statement sent in "is a full, true, and complete statement of account between the creditor and the bankrupt." In the present case the statement was neither full nor complete; the items were unintelligible as they stood. The proof ought therefore to have been rejected until a fuller and more correct account had been sent in. If that had been done the Appellant and those acting with him would have been in the majority. We also contend that, independently of that question, the Registrar was wrong in not calling upon the other creditors to propose an assignee as the majority refused to do so.

Mr. *Little*, Q.C., for *Froggart*:—

The Appellant has no *locus standi* for his appeal; for he had not proved his debt at the time when the decision was made by the Registrar, nor even when the notice of appeal was given. It is too late now to have a meeting for choice of assignees. This must be done at the first meeting: *Bankruptcy Act*, 1861, s. 116. That

L. JJ. 1868

Ex parte BARNETT. *In re* TAYLOR.

meeting has passed, and has not been adjourned; and the second meeting has already been held: *Re Cannot* (1).

SIR W. PAGE WOOD, L.J.:—

It appears to me that justice is on the side of the Appellant, and that there are no such difficulties in granting relief as are suggested. The complaint is that proof of *Froggart's* debt was admitted, and the other creditors thought that as he was admitted it was no use to nominate an assignee, as *Froggart's* friends had the majority of votes; and then the majority refused to propose any one, and no assignee was appointed, although the other side wished one to be chosen. The majority abnegated the power given them by the 116th section; consequently there was a miscarriage, and we are of opinion that it must be taken as if no proceedings had been had at all, and that it is now competent to us to order a new election.

With respect to *Froggart's* proof, he is required by the statute to make a declaration that his statement of account is "full, true, and complete." His statement is nothing of the kind; there is no sufficient statement of the principal debt, and a very imperfect description of the others. His proof, therefore, fails in a very essential point, and ought not to have been admitted.

As regards the Appellant's debt, except the sum of £19 9*s.*, which was not established at the first meeting, the proper course would have been to enter that debt and all the other proofs which had not been objected to before the termination of the meeting.

But as regards the question of the right of the Appellant to bring this appeal, it would be a technicality of the narrowest description if it were not allowed. He was heard before the Registrar, and his debt was allowed except as to £19 9*s.*, although it was not formally proved till the subsequent meeting. He had, therefore, a substantial interest, which was admitted, though not formally proved; and as the formal proof was given before the argument before us took place his right to appeal must be allowed. We think that we ought to make an order to direct the Registrar to continue the meeting for the election of an assignee, and to expunge the proof of *Froggart's* debt.

(1) 8 L. T. (N.S.) 291.

L. JJ.
1868
Ex parte BARNETT.
In re TAYLOR.

SIR C. J. SELWYN, L.J.:—

However loose the practice of the Court may have been as to proving the debts at the first meeting, the Appellant was heard in support of his proof without any opposition being made to his *locus standi*, and his objection to *Froggart's* proof was also heard and overruled. It would therefore be a denial of justice to hold that he could not be heard now. The question, therefore, is narrowed to the question whether *Froggart's* proof ought to have been admitted or not. I think the 144th section has not been complied with, and that his account is quite insufficient. The proof, therefore, ought to have been refused. The meeting has proved abortive, and the proceedings ought now be continued and *Froggart's* proof expunged.

Solicitors: Mr *Duignan*; Mr. *Pearce*.

ATTORNEY-GENERAL *v.* CAMBRIDGE CONSUMERS GAS COMPANY.

L. JJ.
1868
Nov. 23, 24.

Nuisance—Injunction—Breaking up Streets to lay Gas-pipes—Amendment at Hearing.

The disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down gas-pipes, is not a nuisance so serious and important that a Court of Equity will interfere by injunction to prevent it.

Attorney-General v. *Sheffield Gas Consumers Company* (1) followed.

The decision of *Malins*, V.C., reversed.

The views of the governing body of a town, and the motives of the persons instituting a suit, are not immaterial where the complaint is of a public injury.

An information and bill was filed against a gas company, stating, as the fact was, that they had been formed for the purpose of lighting the streets and private houses of a town, and that they had made a contract with the Commissioners of the town to light the streets, and praying for an injunction to restrain them from breaking up the pavements. After the suit was at

(1) 3 D. M. & G. 304.

L. JJ.

1868

ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

issue, but before the hearing, the contract was rescinded, but the Defendants still claimed to go on laying their pipes for the purpose of supplying private houses :—

Held, that it was consistent with the practice of the Court to give leave at the hearing to introduce by amendment a statement of the rescinding of the contract.

THIS was an appeal from a decision of the Vice-Chancellor *Malins*. The case is reported (1).

The suit was commenced by information and bill, the relators and Plaintiffs being the *Cambridge University and Town Gaslight Company*, and the Defendants the *Cambridge Consumers Gas Company, Limited*, and seven of the *Improvement Commissioners of Cambridge* and their clerk.

By the *Cambridge Improvement Act* (28 Geo. 3, c. 64), the property in the streets, pavements, &c., in *Cambridge* was vested in the Commissioners, and they, or any five or more of them, were empowered to order any of the pavements to be taken up, and to order the streets to be lighted in such manner as they should think proper, and to contract with any person or persons for the lighting of the streets.

The Plaintiffs were originally incorporated under an Act of Parliament (4 Will. 4, c. 28), under the name of the *Cambridge Gaslight Company*, and by the *Cambridge University and Town Gas Act*, 1867 (in which was incorporated the *Gas Works Clauses Act*, 1847), they were continued under their present name, and additional powers were given them, a reservation being made of the powers and rights of the Commissioners.

By a contract between the Plaintiffs and the Commissioners, dated the 25th of May, 1854, the Plaintiffs agreed to light the public streets of *Cambridge* for a term of fourteen years from the 1st of June, 1854, and they were empowered to break up any street for the purpose of their contract.

The Plaintiffs purchased land, erected buildings, and laid out twenty miles of main pipes and nearly 3000 private service pipes, and erected 660 street lamps.

On the 12th of December, 1867, the Defendant company was registered under the *Companies Act*, 1862, as a limited company,

(1) Law Rep. 6 Eq. 282.

with a nominal capital of £25,000, "for the purpose of supplying *Cambridge* and its vicinity with gas."

On the 21st of January, 1868, the Commissioners made a contract with the Defendant company, who had made a lower tender than the Plaintiffs, for the lighting of the streets of the town for fourteen years from the 1st of June, 1868. The contract provided that, for the purpose of carrying the contract into effect, the Defendant company might break up the pavement of any street. The Defendant company accordingly commenced to break up the streets and to lay down gas-pipes, and issued a prospectus stating that the directors had determined to supply the colleges and private consumers, and had obtained the contract for lighting the public streets.

On the 5th of March, 1868, the information and bill was filed. It prayed for an injunction to restrain the Defendant company from breaking up the street and footpath adjoining the land of the Plaintiffs, and from injuring or interfering with the pipes of the Plaintiffs, and from breaking up any of the streets and pavements of the town, and from allowing any of the pipes already laid down to continue; and also to restrain the Commissioners from exercising, or assuming to exercise, the power of permitting the Defendant company to break up the streets or interfere with the gas-pipes of the Plaintiffs.

On the 28th of May the Plaintiffs moved for an injunction in terms of the prayer, but the motion was ordered to stand over till the hearing.

On the 1st of June the works of the Defendant company were not in a sufficiently forward state to enable them to commence lighting the town, and on the 2nd of June the Commissioners declared the contract with them to be at an end.

In support of the motion for an injunction, affidavits were made by twenty-five of the chief officers of the University and inhabitants of the town, stating that the opening of the streets by the Defendant company was, in the opinion of the deponents, an unnecessary interference with the traffic of the town, and that, should the laying of the mains be continued generally through the streets of the town, the same must prove, and continue to be, an inconvenience to all persons, whether carrying on business as traders or

L. JJ. 1868

ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

residents therein, by the causing, in the first place, trenches to be dug and mounds erected throughout the length and breadth of the town for the purpose of laying mains, and afterwards, though in a less degree, through the necessity which must arise for breaking up the streets and pavements for such additions, alterations, and repairs, as circumstances might require, especially having regard to the narrowness of the *Cambridge* streets; and another set of affidavits by fourteen other inhabitants, who stated that the Defendants had, after laying down their mains, allowed the trenches to remain open, and mounds of earth to stand near thereto for a considerable time—in *St. Andrew's Street* for the whole of one day and the greater part of the following day—in order that service pipes might be connected with the mains for the supply of private houses, thereby causing a lengthened and unnecessary interference with the traffic of the town; that many of the streets of *Cambridge*, and principally some in the centre of the town, which they specifically mentioned, were so narrow that only one vehicle could pass through them at once, and that if the Defendant company were to break up those streets for the purpose of laying such mains, the traffic through the streets would be entirely suspended, and that there were many narrow streets and places in the town of considerable importance for foot passengers, by the opening whereof, for the purpose of laying their mains, by the Defendant company much inconvenience and annoyance would be caused to the public. An affidavit was also made by the consulting engineer of the Plaintiffs, who stated that the Defendant company were laying their mains close to those of the Plaintiffs, and that it would be impossible for them to continue their work without disturbing and causing great injury to the pipes of the Plaintiffs.

On the part of the Defendant company, affidavits were made by the town surveyor, and by five inhabitants of *St. Andrew's Street*, to the effect that no material inconvenience had been caused by the opening of the streets for their works, that no injury had been done, or would be done, to the property of the Plaintiffs, and that no additional inconvenience had been caused by laying service pipes to private houses, inasmuch as such pipes had been laid by boring under the pavement from the trenches which were open for the purpose of laying the mains to supply the public lamps.

After the contract with the Defendant company had been rescinded, the Plaintiffs filed a further affidavit stating the resolution of the Commissioners, but the information and bill was not amended.

On the part of the Defendant company, further affidavits were made by twenty-one inhabitants of the town, who stated that the competition of a second company would, by keeping down the price and improving the quality of the gas, be a great benefit to the inhabitants far exceeding the temporary inconvenience of breaking up the streets; and the foreman of the contractors who were laying down the Defendant company's pipes made an affidavit stating that five miles of the street mains were complete, that it had not been necessary to stop or divert the traffic in any street, that in the narrow streets the pipes could be easily laid in the morning before the traffic commenced, and that the trenches had not been kept open for the purpose of laying private service pipes.

On the 28th of June the information and bill came on for hearing on motion for decree. The Vice-Chancellor was of opinion that the alleged injury to the Plaintiffs was not proved, but held that there was sufficient nuisance to the public to call for the interference of the Court by injunction, if it had not been that the acts of the Defendant company were justified by the authority of the Commissioners so long as their contract existed. His Honour accordingly refused the motion for decree, but gave the Plaintiffs leave to amend by putting in issue the determination of the contract, and he dismissed the information as against the Commissioners.

On the 29th of July, the information and bill having been amended, the Vice-Chancellor granted an injunction until the hearing, restraining the Defendant company from breaking up the streets.

The Defendant company appealed from the order giving leave to amend, and from the order for an injunction; and they also appealed from a further order of the Vice-Chancellor, by which he had refused to strike out the amendments as irregular.

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the Appellants:—

Assuming that the Defendant company are now acting without the authority of the Commissioners, still this is not a case in which

L. JJ. 1868

ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

the Court will interfere by injunction. The case of *Attorney-General* v. *Sheffield Gas Consumers Company* (1) is strictly in point. It was there decided that the breaking up of the streets of a town to lay down gas-pipes, where the obstruction was only for two or three days at a time in each street, was not a nuisance of such continuous nature as would induce the Court to interfere. The authority of that case has never been questioned, and many gas companies have been founded on the faith of it; and it was recognised in *Broadbent* v. *Imperial Gas Company* (2); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (3); and *Cooke* v. *Forbes* (4). The fact of its being a nuisance at law makes no difference, for this Court will not interfere to restrain an act which is a nuisance at law unless it be either irreparable or incessant. Gas companies are not excepted like railway companies from the Companies Acts; but they are left to the ordinary operation of the law. If these works injure any person he can bring his action, and if the damage is trifling he will get nominal damages; if it is substantial he will get substantial damages.

The Plaintiffs' evidence in the present case fails to make out any actual injury either to themselves or to the public. The witnesses only speak to probable inconvenience, and even that will be only temporary. The Commissioners are the appointed guardians of the interests of the inhabitants; but they make no objection to the proceedings of the Defendants. The only objectors are the Plaintiffs, who are a rival gas company.

With respect to the leave to amend, we contend that this was not a proper case for amendment, for the new amendments raise an issue not arising out of, but contradictory to, the issue raised by the bill. A Plaintiff who has no title at the filing of the bill cannot make out a title by facts subsequently occurring and introduced by amendment: *Attorney-General* v. *Corporation of Avon* (5); *Watts* v. *Hyde* (6); *Bellamy* v. *Sabine* (7); *Lord Darnley* v. *London, Chatham, and Dover Railway Company* (8); *Godfrey* v. *Tucker* (9);

(1) 3 D. M. & G. 304.
(2) 7 Ibid. 436.
(3) Law Rep. 1 Ch. 349.
(4) Ibid. 5 Eq. 166.
(5) 11 W. R. 1050.
(6) 2 Ph. 406.
(7) Ibid. 425.
(8) 1 D. J. & S. 204.
(9) 33 Beav. 280.

Firth v. *Ridley* (1); *Tonkin* v. *Lethbridge* (2); *Pilkington* v. *Wignall* (3); *Beardmore* v. *Gregory* (4).

Sir *Roundell Palmer*, Q.C., Mr. *Osborne*, Q.C., and Mr. *Locock Webb*, for the Informant and Plaintiffs:—

[The LORD JUSTICE WOOD:—We need not trouble you as to the appeal respecting the right to amend.]

The revocation of the contract with the Commissioners removes all the defence of the Defendants. There can be no doubt that the operations of the Defendants constitute a nuisance both to the Plaintiffs and the public, and that the Defendants are committing an illegal act. This was decided in *Ellis* v. *Sheffield Gas Consumers Company* (5). In such a case the jurisdiction of this Court to interfere by injunction is undoubted. But the Defendants claim, in effect, to set the law at defiance, relying on *Attorney-General* v. *Sheffield Gas Consumers Company* (6). That case is not, however, conclusive, for the majority of the Court doubted whether the breaking up of the streets by a gas company was a nuisance at common law, and if *Ellis* v. *Sheffield Gas Consumers Company* had been then decided, they would probably have agreed with Lord Justice *Knight Bruce*, and granted the injunction. Again, the Judges in that case held that under the particular circumstances the injury was trivial; but the decision cannot be taken as establishing the general proposition that in the opinion of this Court the breaking up of the streets of a large town is a mere trivial nuisance, for the extent of the inconvenience to the public and injury to individuals is a matter of daily experience; and it has been expressly held to be a serious public nuisance in *Reg.* v. *Longton Gas Company* (7); *Reg.* v. *Train* (8); and *Reg.* v. *United Kingdom Telegraph Company* (9). In the latter case the Master of the Rolls retained the information for a year, to obtain the opinion of a Court of Law as to the legal right, which he would not

(1) 33 L. J. (Ch.) 598.
(2) Coop. G. 43.
(3) 2 Madd. 240.
(4) 2 H. & M. 491, 496.
(5) 2 E. & B. 767.
(6) 3 D. M. & G. 304.
(7) 29 L. J. (M. C.) 113.
(8) 2 B. & S. 640
(9) 2 B. & S. 647, n (*a*).

L. JJ.
1868
ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

have done unless he had been inclined to grant an injunction: *Attorney-General* v. *United Kingdom Telegraph Company* (1).

But if the injury in each particular instance is considered trivial it will be incessant, and that is itself a ground for granting an injunction. The Plaintiffs and the Attorney-General ought not to be obliged to bring continual actions or indictments with no substantial result: *Tipping* v. *St. Helen's Smelting Company* (2); *Crossley* v. *Lightowler* (3). And in *Attorney-General* v. *Sheffield Gas Consumers Company*, Lord *Cranworth* says (4): "Once establish that the setting up of something permanently is a nuisance, and it is immaterial whether it is more or less," and he refers to *Rochdale Canal Company* v. *King* (5).

The *Gas Companies Act* (10 & 11 Vict. c. 15) places great restraints on gas companies incorporated under that Act, to secure the public from annoyance and injury; and it is unreasonable to suppose that the Legislature intended to leave companies like the Defendants, which are independent of the Act, altogether free to create as much annoyance as they please.

With respect to the injury to the Plaintiffs as a company, it consists not only in the present damage which may be done to the property; but the Defendants will in time acquire an easement which will give them a right to interfere with the freedom of the Plaintiffs in laying down their own pipes: *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (6).

SIR W. PAGE WOOD, L.J.:—

In this case we are, in fact, called upon to overrule the case of *Attorney-General* v. *Sheffield Gas Consumers Company* (7), for we we do not think that the Vice-Chancellor has shewn any serious distinction between the two cases. Indeed, if there is any distinction, the grounds for interference by injunction in the former case were much stronger than in the present. In that case, as here, the Plaintiffs and relators were a rival gas company, but the town in question was *Sheffield*, a town of vast manufactures, and of far

(1) 30 Beav. 287. 8 Jur. N.S. 583
(2) Law Rep. 1 Ch. 66.
(3) Ibid. 2 Ch. 478.
(4) 3 D. M. & G. 314. 17 Jur. 677
(5) 2 Sim. (N.S.) 78.
(6) Law Rep. 1 Ch. 349. 12 Jur. N.S. 58.
(7) 3 D. M. & G. 304. 17 Jur. 677

greater traffic than *Cambridge*. In that case, even upon the most favourable statement, the Defendants contemplated executing their works through seventy miles of streets, only six miles of which had been laid—about one-twelfth of the entire distance; in the present case about one-fourth of what is contemplated has been done. What, then, are the points relied upon by the Plaintiffs to distinguish that case from the present? The point most strongly relied upon was that the law was then uncertain, that it was not clear that the proceedings of the Defendants would be held at law to be a nuisance, regard being had to all the circumstances of that case. But in that case it was assumed, on the application for the interlocutory injunction, that the proceeding must be unlawful, as there was no warrant for taking up the streets, and nothing therefore to justify that which must for a certain period have interfered with the traffic and with the convenience of those who had shops. It is undoubtedly true that at the hearing, as Lord *Cranworth* himself said in *Broadbent* v. *Imperial Gas Company* (1), doubts were thrown out by himself and by Lord Justice *Turner* as to whether, under all the circumstances of the case, it would be held to be a nuisance at law; but the course taken, as he himself said, in the same case, did not turn upon that, and he never expressed any doubt or dissatisfaction with the judgment in *Attorney-General* v. *Sheffield Gas Consumers Company* (2) on the ground of its having proceeded on a mistaken notion that the act complained of would not be considered a nuisance at law. If the case had rested upon any doubt of that kind, the course taken would certainly not have been to dismiss the bill, but the bill would have been retained, as was done by the Master of the Rolls in *Attorney-General* v. *United Kingdom Telegraph Company* (3), in order to take the opinion of a Court of Law.

That being so, there really appears nothing else to distinguish that case from the present; for with respect to the extent of the nuisance the facts were, as I have said, much stronger in that case than anything which we find here. At that time, it is true, the extent and aggravation of the nuisance had not been so strongly commented upon as it has been in some of the subsequent cases at

(1) 7 D. M. & G. 461. 3 Jur N S 221 (2) 3 D. M. & G. 304. 17 Jur 677
(3) 30 Beav. 287. 8 Jur N S 583

L. JJ. 1868 ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

law; but even allowing that, there is sufficient to shew that this is not a case, having regard to all the circumstances, in which the Court, according to its ordinary rules, will interfere by way of injunction. If I had felt any doubt upon the propriety of that decision, I should not have thought it right, after a decision had been come to by the full Court (although one eminent member of that Court differed in opinion), and had remained for fifteen years unquestioned, to treat it as a case which we ought to overrule, without its being considered by a higher tribunal.

The reason why I say that I do not entertain the doubts which have been expressed by the Vice-Chancellor, and why I do not concur in the views of the learned Lord Justice who differed from the other two Judges, is not that that case can be taken as having established any such rule as Mr. *Cole* contended for. He appeared to think that a company of this description, unfurnished with any of those powers and authorities which an Act of Parliament might give them, has a right to erect works and to incur expenditure upon the faith of that case, and then to say: "We will tell the Court that we have laid out our money and have commenced our works by the authority of the Court itself; and although the law has decided that the acts done distinctly constitute a nuisance, and subject us to an indictment, nevertheless, we may defy the proceedings of a Court of Law, because a Court of Equity will not interfere by injunction." Nothing that we are now doing, nor any sanction which we are now giving to that decision, holds out anything in the least contrary to that which was decided by the Court of Queen's Bench in *Reg.* v. *Longton Gas Company* (1), where it was held, upon grounds in which I entirely acquiesce, that to say that any private individual or company may break up the pavements for the purpose of laying down gas-pipes or water-pipes, or of making communications with the gas-pipes or water-pipes of another company without subjecting themselves to an indictment, would be to create confusion and discomfort to the inhabitants of a town. I agree with Sir *Roundell Palmer* that *Attorney-General* v. *Sheffield Gas Consumers Company* (2) must be taken upon its own circumstances; but it rests upon principles well established. One of them is this, that where the Court interferes by way of injunction to pre-

(1) 29 L. J. (M.C.) 118. (2) 3 D. M. & G. 304.

vent an injury in respect of which there is a legal remedy, it does so upon two grounds, which are of a totally distinct character; one is that the injury is irreparable, as in the case of cutting down trees; the other that the injury is continuous, and so continuous that the Court acts upon the same principle as it used in older times with reference to bills of peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable. As an illustration of this class of case, I may refer to *Soltau* v. *De Held* (1), where the annoyance from the ringing of the bell was in itself slight, but it was so continuous that the Court thought fit to arrest the nuisance *brevi manu*, and save the complainant all further annoyance.

If, therefore, in the present case it had been made out that there was, either to the public, or the owners of property adjoining the streets, such a continuous injury, an injunction would be granted; and we must accordingly look narrowly at the evidence, as the Judges did in *Attorney-General* v. *Sheffield Gas Consumers Company* (2), to learn the amount of continuous injury which is likely to be inflicted. The principal reasoning of the Judges in that case applies with still stronger effect here. They said in effect: "Although it is true that the company are about to take up no less than seventy miles of streets, it will be at different times, and at no one time will it occupy more than two or three days; that may be an indictable offence, but we do not think it is such an injury as to call for the interference of this Court." No doubt there may be cases in which this Court would interfere to prevent injury of this nature being done only for a single day, as where there is a street with immense traffic, and there is danger that by the loss of that traffic for a single day custom would be diverted elsewhere and lost. But this is not a case of that kind. We have here the same circumstance which occurred in *Attorney-General* v. *Sheffield Gas Consumers Company*, and which, I think, influenced the judgment of the Court—that it is not an *ex officio* information in which the Attorney-General gathers up the complaints and injuries of a whole district, and lays them before the Court; but it is an information at the relation of

(1) 2 Sim. (N.S.) 133. (2) 3 D. M. & G. 304.

L. JJ.
1868
ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

a rival gas company, who are also the Plaintiffs. They have a perfect right to bring themselves forward as Plaintiffs if any special damage has been inflicted upon them. But I agree with the Vice-Chancellor, that upon the evidence before us they prove no injury whatever to their property; their witnesses speak a good deal of contemplated and possible injury to the pipes, but no one witness has come forward to prove that any specific injury has been done.

Then, when we come to the injury to the public, several learned Heads of colleges and others say that they contemplate great inconvenience; but, as was the case in *Attorney-General* v. *Sheffield Gas Consumers Company* (1), although five miles of pipes have been laid down, no one comes forward to say that he has actually sustained any injury from the taking up of the pavements. It is true that they say that when the Defendants come to the narrow streets there will be great inconvenience. But some part of the five miles already laid down was in the narrow streets, and, at all events, no evidence has been brought before us to satisfy us that the injury is such as this Court ought to interfere by injunction to prevent.

We were, however, much pressed on the part of Sir *Roundell Palmer*, with his usual power, by this argument, which did not escape the attention of the Court in *Attorney-General* v. *Sheffield Gas Consumers Company*. He argued that the Legislature, by the *Gas Companies Act*, 1847, has imposed important restrictions upon the Plaintiffs and other gas companies incorporated under Act of Parliament; and is it to be supposed that the Legislature, who thought these restrictions necessary for the protection of the inhabitants of a town when a company is entrusted with corporate powers to do particular acts, would think them unnecessary when persons of their own free will took upon themselves to do those acts without any authority? But I conceive this answer may be given to that argument. The Legislature has entrusted large and extraordinary powers to incorporated gas companies, and has taken care to guard those powers by giving larger and more immediate remedies to the public. But as to the other companies, it has left them to the ordinary operations of law, which it assumes will be sufficient with regard to them. But there is an observation not unworthy of notice made by Lord *Cranworth* on this subject in

(1) 3 D. M. & G. 304.

Attorney-General v. *Sheffield Gas Consumers Company* (1). He says: "The Legislature must have looked at the fact that companies may be formed for the manufacture and supplying a town with gas, and may carry into effect the object which they contemplate without the authority of Parliament." And then he says: "Perhaps the Legislature thought that this would only be done with the sanction of the surveyors or proper authorities, which would prevent anything taking place which they considered injurious to the public who would pass along and use the road or street in which the pipes would be laid, and that such a discretion might be safely entrusted to those authorities." I may add, that in some cases they might find that the whole town were willing that the works should be done.

In the present case, any member of the town has it in his power to proceed by way of indictment; and if the matter had been brought before us at the instance of a large number of inhabitants who had proceeded by way of indictment, and we saw that they would be obliged to have recourse to perpetual indictments, that might take the case out of the authority of *Attorney-General* v. *Sheffield Gas Consumers Company*. But here we have a body of Commissioners incorporated from a very early period, consisting of the Heads of all the colleges, and representatives of the borough in Parliament, the magistrates, and other persons, who have powers of the largest description over the carriage-way and the pathway, the soil of which is vested in them. Every stone that is dug out is a trespass upon their property, and if they thought it right, as representing the whole town, they might act in this matter. But they do nothing of the kind. We only find that the information is filed at the instigation of a rival gas company. A similar state of circumstances, in *Attorney-General* v. *Sheffield Gas Consumers Company*, weighed in the decision come to by the learned Judges upon the interlocutory motion. Lord Justice *Knight Bruce* then said (2): "And with regard to the public question, there is another consideration not to be forgotten. I agree that motives are very often immaterial with reference to the manner of disposing of a suit. It has been said by an eminent Judge, that if you were to look into the motives of suitors, Courts of justice would not sit

(1) 3 D. M. & G. 338. 17 Jur 682 (2) 3 D. M. & G. 311. 17 Jur 677

L. JJ. 1868

ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

above a month in the year, and would have little to do. Of course there are, in numerous instances, motives for litigation which, if they could be looked into, would prevent a Court of justice from interfering. But generally I agree that it is not the rule so to regard them. Where, however, the public interest purports to be asserted, it is not wholly immaterial, at least upon an interlocutory application, to look into the motives from which, or under which, the matter is brought forward. Now, in the present case, though the Attorney-General's name is used, it is impossible not to see that the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material. But we find, as a fact, that the majority of the town council is in favour of what the Defendants are proposing to do; and on a question of discretion it is impossible, with reference to a community of this description, not to look with some degree of attention at what the governing body of the borough think on the subject. It is said that many of the members of the town council are interested in favour of the Defendants' undertaking. I dare say that it is so, still they are members of the governing body, and the opinion of the majority is as I have stated." These observations have much greater weight, no doubt, upon an interlocutory application, and that learned Judge, upon the subsequent hearing, thought he was justified in differing from the other Judges.

In the present case we find that not one single inhabitant is brought forward to say, though five miles of work has been completed, that there has been any inconvenience to himself; no single passenger along the Queen's highway says that he has been impeded; and we have also the fact that there is existing a body who might take up all such injuries on behalf of the town, and insist upon stopping anything that threatened a continuous infraction of the law, and they might ask for protection in the nature of a bill of peace against having to bring perpetual actions. But no such case is made here any more than in the *Sheffield Gas Company's Case* (1). Unless, therefore, we are prepared to overrule that case, we cannot concur in the decision of the Vice-Chancellor. The Vice-Chancellor would have dismissed the bill if he had not

(1) 3 D. M. & G. 304.

thought it right to give leave to amend. But as the amendment has put it in no better condition than that case which the Vice-Chancellor has purposely disregarded, and which, I think, ought not to be disregarded, I am of opinion that the bill ought at the first hearing to have been dismissed with costs.

SIR C. J. SELWYN, L.J.:—

With respect to that part of the decree which gave the Plaintiffs liberty to amend, it has been argued that the Vice-Chancellor proceeded in a manner inconsistent with that class of case of which *Pilkington* v. *Wignall* (1) may be treated as an example. In that and all the other cases which have been cited in support of the same view there was an original defect in the Plaintiffs' title which it was sought to cure by the introduction of statements of facts which had occurred after the bill was filed. But in the present case the title of the Attorney-General does not in any degree depend upon the contract between the Commissioners and the Defendants. He sues, as representing the public, by an original, independent title, namely, as protector of the rights of the public against a nuisance to the public highway. It was argued that the contract is alleged in the information and bill, and that the title of the Attorney-General to sue depends upon acts done in pursuance of that contract. If the Defendants' case had been that this right to interfere with the streets depended upon the existence of the contract with the Commissioners, and that they had never done, or threatened, or intended to do, anything except in pursuance of and under that contract, there would have been more substance in their contention. But it appears from their prospectus, and also from their own affidavits, that the Defendant company was formed not merely for the purpose of supplying the lamps in the public streets, but also for the supply of private houses, and that they desire and intend to supply private houses, especially the poorer houses in the town, with gas, and they still contend that they are entitled to continue their operations for this purpose; and statements to the same effect were made in the original bill. I think, therefore, that the right of the Informant and the Plaintiffs to sue does not in any way depend upon the contract; but the con-

(1) 2 Madd. 240.

L. JJ. 1868

ATTORNEY-GENERAL v. CAMBRIDGE CONSUMERS GAS CO.

tract may, with more propriety, be said to constitute a portion of the Defendants' case; and although there may be some objection to the precise terms in which the liberty to amend is given by the decree, in my judgment the case was one in which, according to the principles and rules of the Court, an amendment of the bill was properly allowed at the hearing.

With respect to that which is the substance of the case, I think we have, in allowing this appeal, merely acted upon the principle which has been so clearly established and so often recognised in former decisions, namely, that this Court will not interfere by way of injunction where the injury proved is only temporary and trifling. As it was expressed by Lord *Cottenham*, in *Elmhirst* v. *Spencer* (1): "The Plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the Defendants as would have entitled him to a verdict at law in an action for damages." Each case, of course, must depend upon its own circumstances, and it may often be very difficult to define on which side of the dividing line the case falls. But when we find the particular point to have been already decided by the Court of Appeal, and that the present case turns out to be very much weaker than the case so decided, we should be introducing the greatest uncertainty if we were to come to a different conclusion. That this case is very much weaker than the *Attorney-General* v. *Sheffield Gas Consumers Company* (2) is apparent, I think, from a consideration of the affidavits upon which the Informant principally relies. They are affidavits of gentlemen well acquainted with the town; yet they only state a general opinion that if the works are constructed, nuisance will accrue; they bring forward no single specific instance of any injury having been occasioned to any individual.

I agree with the Lord Justice in dissenting entirely from the proposition that the case of *Attorney-General* v. *Sheffield Gas Consumers Company* has established any such result as has been contended for, namely, a general right for every gas company, without the authority of Parliament, to interfere as they think fit with the streets and public ways of a town. I think that a gas company which undertakes so to proceed without the authority of Parlia-

(1) 2 Mac. & G. 45, 50. (2) 3 D. M. & G. 304.

ment is exposed to a great number of perils, and I believe there are many instances in which companies having tried to proceed without such parliamentary authority have afterwards found themselves compelled to apply for and obtain such powers. They are, of course, subject to the rights of the owners of the soil through which their pipes are laid; and although they may obtain the authority of the persons in whom the pavement is vested, still they are at any time subject to the rights of the owners of the soil to interfere with their pipes unless they have obtained parliamentary sanction. But although they are exposed to those dangers, they are nevertheless, like all other persons, entitled to insist upon the principle on which this Court has always acted, and to say that no such serious or permanent injury has been proved as would justify the interference of the Court by way of injunction. They are certainly not the less entitled to set up this defence if, as in the present case, the Informant is set in motion not by the inhabitants of the town, or by any public body representing them, but by a rival company engaged in the same trade or business. In my judgment, no such injury as is requisite to establish a case for an injunction has been proved, and therefore I think the information and bill ought to have been, and must now be, dismissed with costs.

Solicitors for the Informant and Plaintiffs: Messrs. *R. & C. H. Hodgson.*

Solicitors for the Defendant Company: Messrs. *J. & C. Cole.*

Ex parte DEACON. *In re* DEACON.

Bankruptcy Act, 1861, s. 192—*Assent of Creditors—Bona fides.*

An officer in the army, who was under an engagement with a judgment creditor to pay the debt out of the moneys to arise from the sale or exchange of his commission, retired on half-pay, and, on being arrested by the judgment creditor, executed an arrangement deed, assented to by the requisite majority of his creditors, by which he bound himself to pay them a composition of 10*s.* in the pound. At this time he had money in hand a little more than sufficient to pay the composition on his debts, which debts amounted to about £3000, and his half-pay was, at least, £150 a year. No meeting of

L. JJ.
1868
Ex parte DEACON.
In re DEACON.

creditors was held, nor was it shewn that the assenting creditors had investigated the debtor's affairs:—

Held, that it was to be inferred that the assenting creditors had not exercised a discretion, with a view to their own pecuniary interests, as to whether the composition was fair, but had acted from some motive leading them to favour the debtor, and that the deed was invalid as against a dissenting creditor.

40 B 72
50 L 327

THIS was an appeal by a debtor from an order of Mr. Commissioner *Winslow* refusing to order his release by virtue of a deed of arrangement with his creditors.

In July, 1867, Major *Deacon*, the debtor, who was a major in the army on full pay, was indebted to his sister in £1377, and to Colonel *Yonge*, a relative, in £269, for which they had recovered judgment, and, being in custody at their suit, executed a deed, dated the 19th of July, 1867, by which he assigned to his sister all moneys which should come to the hands of Messrs. *Cox & Co.*, the army agents, on his account, which moneys the sister was to hold upon trust to pay certain costs and the debts due to herself and Colonel *Yonge*. By this deed the debtor covenanted that he would not sell or exchange his commission except through the agency of *Cox & Co.*, so that the money would pass through their hands, and that he would not do anything by which he might be deprived of his commission, or prevented from selling it. He, at the same time, gave two warrants of attorney to the detaining creditors, and was released from custody. By a memorandum of even date he agreed to make immediate arrangements for retiring on half-pay, or selling his commission, and to pay to the attorneys of the two Plaintiffs the proceeds to an amount sufficient to pay the debts and costs.

After this, frequent communications took place between the debtor and Colonel *Yonge's* solicitors as to the debtor's selling out or exchanging, and a correspondence on the subject closed with a letter of the 2nd of July, 1868, from the debtor's solicitors to the solicitors of Colonel *Yonge*, promising to inform them on what day the sale of the debtor's commission would be gazetted as soon as they were in a position to give the information. Nothing further appeared to have passed till the 2nd of September, when the debtor's solicitors wrote again to the solicitors of Colonel *Yonge*, stating that the debtor had sent in his papers for retirement. He was allowed

to retire on half-pay, and then was arrested and sent to prison at the suit of Colonel *Yonge*. He then executed a deed of arrangement, dated the 2nd of November, 1868, which was assented to by the requisite majority of creditors, and duly registered, whereby he covenanted to pay within fourteen days to a trustee for his creditors the amount of a composition of 10*s*. in the pound on all his debts. No meeting of creditors was held, nor was there anything to shew that the assenting creditors had made inquiry into the state of the debtor's affairs.

At this time he had in his hands £1650; his debts amounted in all to £3125, including the debts to his sister and Colonel *Yonge*, the former of whom assented to the deed, and his half-pay was from £150 to £160 a year.

The debtor applied to be released from custody, but Mr. Commissioner *Winslow* considered that, on the principle of *Ex parte Cowen* (1), the arrangement deed was invalid as against a dissenting creditor, and he accordingly refused the application, with costs.

Mr. *Sargood*, and Mr. *Reed*, for the Appellant, contended that the case was not governed by *Ex parte Cowen*, and that there was nothing to impeach the *bona fides* of the assenting creditors.

Mr. *Glasse*, Q.C., and Mr. *W. R. Cole*, *contrà*, were not called upon.

SIR W. PAGE WOOD, L.J.:—

If we examine the case of *Ex parte Cowen*, we find it laid down that where a debtor, having placed himself in such a position that a judgment creditor could sweep away the whole of his assets, takes steps to secure a fair division of them among his creditors by means of a deed of arrangement, the Court will not inquire very strictly into what had taken place between the debtor and the particular creditor, and will not be ready to treat the arrangement as fraudulent. That is the principle on which the Court will act where the debtor is, by his arrangement deed, giving up the whole of his property. But where the Court finds the arrange-

(1) Law Rep. 2 Ch. 563.

L. JJ.
1868
Ex parte DEACON.
In re DEACON.

ment to be one by which the debtor is not giving up the whole of his property, but is retaining a considerable part for his own benefit, and is disappointing a creditor with whom he has entered into an engagement to pay him out of the property which the arrangement distributes among the creditors generally, then the Court will inquire strictly whether the consent of the assenting creditors has been given *bonâ fide* for the purpose of doing what they consider best for their own pecuniary interests, or has been given with some other view, not for the purpose of benefiting themselves, but rather with a view of protecting the debtor. In *Ex parte Cowen* (1) the Court found that the assenting creditors had held no meeting, had entered into no inquiry as to the state of the debtor's assets and liabilities, nor made any endeavour to ascertain what proportion of his property he was giving up; and it appearing that he retained a considerable part of his property, the Court came to the conclusion that the assent of the creditors was not given *bonâ fide* with a view to their pecuniary interests, so as to make the deed binding on dissentient creditors. In the present case this gentleman, holding a commission in the army, entered into an arrangement with two of his relatives, who were creditors of his, that all moneys which should come to the hands of *Cox & Co.*, his army agents, on his account, should be a security for those debts, and that he would not sell out or exchange except through *Cox & Co.*, and that he would make immediate arrangements for raising money by retiring on half-pay, or selling his commission. He retires on half-pay; and if the amount which he thus received had been the whole of his property, there would have been nothing to throw suspicion on the arrangement by which it was given up to the general body of creditors. But when we see that by retiring on half-pay he retains in the shape of half-pay one half of his property for his own benefit, giving up only the other half to the general body of his creditors, so as to disappoint the two judgment creditors, we must say, so far as regards his conduct, that he does not intend to make a fair arrangement with his creditors. If we look at the conduct of the assenting creditors, it appears clear that they have not exercised a fair discretion as to whether the arrangement is for their own pecuniary benefit; they have taken no pains

(1) Law Rep. 2 Ch. 563.

to ascertain whether it is so; and we are obliged to come to the conclusion that for some motive apart from their pecuniary interests they are willing to release the debtor on receiving a certain amount of composition, whether reasonable or not. Such an assent cannot make the deed binding on dissenting creditors. I therefore agree with the decision of the Commissioner.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion.

Solicitors: Mr. *C. J. Vyner*; Messrs. *Dangerfield & Fraser*.

L. C.
1869
Jan. 23, 25, 28.

HORSLEY *v.* COX.

Judgment Creditor—Equitable Debt—Garnishee Clauses of Common Law Procedure Act, 1854—17 & 18 *Vict. c.* 125, *ss.* 60—66.

A judgment creditor cannot obtain a charge in Equity on an equitable debt by analogy to an attachment of a legal debt under the garnishee clauses of the *Common Law Procedure Act*, 1854.

A judgment debtor was entitled under a will to one-fourth of the profits of a business which was managed by trustees, subject to a condition of forfeiture if he alienated or charged his share. A sum of money arising from the business was standing at the bankers in the names of the trustees. The judgment creditor filed a bill to establish a charge against the money at the bankers representing the judgment debtor's share of past profits, by analogy to an attachment under the garnishee clauses of the *Common Law Procedure Act*:—

Held (affirming the decision of the Master of the Rolls), that the bill could not be sustained.

Semble, if such a bill could be sustained, the filing of the bill would be the process analogous to the garnishee order, and the charge would affect the fund in the hands of the trustees from the date of the bill.

THIS was an appeal from a decision of the Master of the Rolls.

Jane Caroline Cox, by her will, dated the 12th of August, 1858, bequeathed, among other things, the weekly paper called "*The Builder*," and the copyright thereof, and the leasehold premises in which it was published, to the Defendants *J. C. Mann* and *D. S. Bockett*, upon trust to carry on the publication of the paper, with full discretionary power as to the management thereof; and upon trust to pay one-fourth part of the net profits to the Defendant, *J. A. D. Cox*, during his life, and after his death to the persons therein named; and as to the other three-fourths of the net profits upon the trusts therein mentioned. And the testatrix declared that if the said *J. A. D. Cox* should be outlawed or declared bankrupt, or become an insolvent debtor, or should assign, charge, or incumber, or attempt or affect to assign, charge, or encumber his share of the profits, or any part thereof, or should do anything whereby the same or any part thereof might, if belonging absolutely to him, become vested in or payable to some other person or persons, then and thenceforth his share of the profits should, during the re-

mainder of his life, sink into and form part of her general personal estate, which she bequeathed to other persons.

The will contained a direction that no person entitled to any share of the profits of the *Builder* should have any right of control or interference over the management of the publication, or over the mode of ascertaining or dividing the profits, nor any right of investigating the accounts, or requiring any explanation thereof, except that the trustees should in the month of January in each year draw up a balance sheet shewing the net profits to the preceding 31st of December, which balance sheet the persons entitled to the profits should be entitled to inspect.

The testatrix died in 1858, and her trustees carried on the publication of the *Builder* under the trusts of her will. They declared the profits of the publication from time to time, and paid the shares to the parties entitled. A considerable sum was standing in their names at their bankers.

The Plaintiff, *Charles Horsley*, had obtained several judgments against the Defendant *Cox*, one of which formed the subject of the present contention.

Cox had paid various sums of money to the Plaintiff in respect of these judgment debts, and in particular, in August, 1865, he assigned his share of the profits, on the June division of profits of the publication, to the Plaintiff, in pursuance of which the trustees paid the sum of £494 12*s.* 6*d.* to the Plaintiff.

At length, however, the Plaintiff having exhausted his remedies at Law, filed the present bill on the 17th of November, 1865, alleging that a large sum of money was standing in the names of the trustees at their bankers, and praying that it might be declared that this sum represented profits of the *Builder*, of which the Defendant *Cox* was entitled to one-fourth, and that his share ought to be applied in payment of what might be found due to the Plaintiff in respect of his judgment debt. The bill also prayed for an injunction to restrain the trustees from paying any part of the money in their hands to the Defendant *Cox*.

The last account which had been made out by the trustees before the filing of the bill, was made out up to the 29th of September, 1865. On this account a sum of about £250 appeared due to *Cox*

L. C. 1869

HORSLEY v. COX.

By an order made by consent in the cause, £150, part of the sum was paid to the Plaintiff, and £100 to *Cox*.

The Plaintiff moved for an injunction to restrain the trustees from parting with the money, but the motion was refused. When the cause came to a hearing the Master of the Rolls dismissed the bill with costs, and the Plaintiff appealed from his decree (1).

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

If the money in the hands of the bankers had been standing to *Cox's* account, it would have been a legal debt to him, and the Plaintiff could have attached it under the 60th and following

(1) The judgment of the Master of the Rolls (Dec. 6th, 1867) was as follows:—(12 W.R. 292)

It is impossible for the Plaintiff to escape from the dilemma in which he is. The decree creates a charge. That creates a forfeiture. But it only creates a charge on future profits; it does not create any charge on past profits; and what the Plaintiff ought to have done, if he could have done it without creating a forfeiture, was to adopt the course, which was a very strong one, taken by a judgment creditor in *Yescombe* v. *Landor* (28 Beav. 80). In that case the Defendant, *Landor*, had considerable property in this country, but he only had a life estate, which was in the hands of trustees. The judgment creditor could not make his judgment available for twelve months, under the Act of Parliament; and if the debtor went abroad, and died within the twelve months, the creditor would have lost everything. Thereupon the creditor asked to have the rents impounded for one year. The case was argued very strongly, as it was quite a new case; but I made the order. But that case went on this principle—that you must create the charge by a decree of this Court, and you cannot touch anything that is paid over before the decree is made; but you may impound rents to be afterwards taken, as was done in that case; and if the Plaintiff could have impounded the profits in the hands of the trustees, without any forfeiture, then he might possibly have been entitled to them at the hearing; but without that, he can do nothing.

It is clear the trustees cannot alter the rights of the parties by choosing not to pay over the profits to the Defendant, *Cox*. If they choose to keep the money in their own hands, that does not give the Plaintiff any right to have a charge upon them. The money at the bankers is either *Cox's*, or not. If it is his money, the Plaintiff may get it under the *Common Law Procedure Act*. If it is not his money, then it is a debt due to the trustees, who are liable to account to him for it. But at present I do not know any case in which you have been able to charge a mere equitable debt under the *Common Law Procedure Act*. The future rents, it is clear, cannot be claimed, because the moment I make a decree for taking the future rents, that creates a forfeiture under the will, and there is nothing in the Act which enables me to give a charge upon these past arrears. I am of opinion, as I was at the hearing of the motion, that the whole bill fails, and must be dismissed with costs.

sections of the *Common Law Procedure Act*, 1854. But as it was in the names of the trustees, it was an equitable debt, and the Plaintiff, therefore, comes to this Court to assist him, in the same way as this Court will assist a judgment creditor who is prevented from extending the land of his debtor by the existence of an outstanding legal estate. The Court in such a case can remove the legal obstacle: *Harris* v. *Davison* (1); *Gore* v. *Bowser* (2); *Bennett* v. *Powell* (3).

It is true that the amount of *Cox's* share of the profits is not ascertained, but that is no reason why the Plaintiff's judgment should not affect it. A judgment creditor can levy execution against his debtor's interest in partnership chattels, and then a suit may be instituted to take the partnership accounts in order to ascertain the amount of the debtor's interest: *Habershon* v. *Blurton* (4). And it has been expressly decided that the clauses of the *Common Law Procedure Act*, under which we are now claiming, are applicable to a legal debt, which is unascertained and a matter of account: *Daniel* v. *M'Carthy* (5). The only question, therefore, here is whether the debt being equitable the creditor is to be deprived of his remedy.

It is, however, said that at the time when the bill was filed there was no debt due, because all past profits, which alone the judgment could reach, had been paid over by the trustees. But we contend that the profits which have accrued between the filing of the bill and the date of the decree are affected by the judgment. The Court will proceed by analogy to the proceedings at Law. What is the analogous order to the garnishee order? It cannot be the mere filing of the bill; it must be either an injunction against the trustees (if one be granted) or the decree.

Mr. *Southgate*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Edmund James*, for the Defendant *Cox*:—

We do not dispute the doctrine that a judgment creditor will be aided in Equity to obtain possession of his debtor's interest in land. But in that case the Court only removes a formal obstacle which pre-

(1) 15 Sim. 128.
(2) 3 W. R. 430, 35 L. J. Ch. 192
(3) 3 Drew. 326. 1 Jur. N.S. 719
(4) 1 De G. & Sm. 121.
(5) 7 H. C. L. Rep. 261.

L. C. 1869 HORSLEY v. COX.

vented the creditor from enforcing his legal right. But here the judgment creditor has no legal right except what is expressly given him by the statute. The statute only gives him power to attach a legal debt of his debtor; if the Legislature had wished to include equitable debts it might have done so; but it has not. He has, therefore, no equity to come for help to this Court: *Thomas* v. *Cross* (1). It would effect a complete revolution in the law of judgments if every judgment creditor could file a bill for an account of a partnership in which his debtor was engaged, or to affect his property in the hands of trustees. The garnishee custom has existed in the City of *London* and *Bristol* for a long period, yet no such bill as this has ever been filed.

But even if the Plaintiff is right in his view of the law, there is in the present case no debt for the Court to attach. For there was a division of profits just before the bill was filed, and there could be no more profits realized until the next taking of the accounts, which was not till after the filing of the bill. As, therefore, the judgment could, by reason of the forfeiture clause, only affect past profits, the filing of the bill, which is analogous to the service of the garnishee order, could have no operation.

Sir *R. Baggallay*, Q.C., and Mr. *Faber*, for the trustees, referred to *Montefiore* v. *Behrens* (2).

Mr. *Jessel*, in reply.

LORD HATHERLEY, L.C., after observing that the case had been extremely well argued, and referring shortly to the facts before stated, continued:—

The argument on behalf of the Plaintiff has been, that where there is nothing but a legal obstacle in point of form in the way of a person recovering a right, such as a legal estate outstanding, this Court will set aside such obstacle, and enable the person who is entitled to the right to assert it, notwithstanding the legal interest of which a Court of Law is forced to take notice. And it is contended that by the *Common Law Procedure Act*, 1854, a power of attachment is given to a judgment creditor in respect of money

(1) 2 Dr. & Sm. 423. 11 Jur. N.S. 384 (2) Law Rep. 1 Eq. 171. 35 Beav.

due from any person whatsoever to his debtor; and that in the present case there being moneys due to the Defendant at the filing of the bill, and still more at the date of the decree, and these moneys being moneys which are not due at Law—the trustees being legally entitled to them—the difficulty ought to be got over by the Court interfering and aiding the judgment creditor by giving him the same remedy in Equity which he would be entitled to at Law, if it were not for the difficulty arising from the debt being an equitable debt.

There is great plausibility in the argument, but I have come to the conclusion that the doctrine referred to has no application to a case like the present, arising under the *Common Law Procedure Act*. By that Act this particular remedy is granted in a very special manner and under very special terms, and there is no ground for saying that this Court can interfere so as to alter the position of the parties by simply putting aside the legal obstacle so as to bring the whole matter into this Court, and to arrest the money by means of a process analogous to an attachment.

[His Lordship then referred to the garnishee clauses, from the 60th to the 66th sections of the *Common Law Procedure Act*, 1854, and continued:—] Now all this clearly involves a series of regulations governing a very peculiar process accorded by this Act. Then, by the interpretation clause, sect. 99, the word "Court" is interpreted to mean one of the superior Courts of Common Law at *Westminster*. In the *Common Law Procedure Act*, 1852, there is a special clause (the 226th) referring to proceedings in Equity, but the whole of the Act of 1854 is expressly applied to Common Law procedure. In that state of circumstances, it appears to me that the case is very different from the case of a person having a judgment against his debtor, and finding that at Common Law his judgment is arrested when he seeks to enforce it by an outstanding legal interest. Since the 1 & 2 Vict. c. 110, the effect of judgments has been interfered with much less than formerly. The judgment creditor, for instance, found his judgment interfered with by an outstanding term; and if this Court simply set aside the obstacle of the outstanding term, the procedure would take its ordinary course, and the creditor was relieved accordingly. But

L. C. 1869 HORSLEY v. COX.

here is a special remedy directed to a special case, and very special observances directed by the Act—particularly by the 66th section, which enacts that a book shall be kept by the Court in which every attachment is to be registered, and which all persons are to have an opportunity of inspecting—a rule which is inapplicable to this Court or its proceedings. It is clear that the process is only adapted for the simple case of a debt due from a third person to the judgment debtor, where the judgment creditor could at once obtain payment of the debt.

Mr. *Jessel* called my attention to the case of *Daniel* v. *M'Carthy* (1), in which it was decided that the mere circumstance of the claim being a matter of account did not prevent the operation of the *Common Law Procedure Act*, because that was certain which could be made certain. Still, however, there remains this observation, that it was matter of account between the judgment debtor and the person who was indebted to him, and as between these two persons it was a simple case; whereas what I am asked to do now is, in effect, to say, that wherever there is a suit for administration of a testator's estate, and wherever there is a trust created under a will—cases in which the suit may be exceedingly complicated in its character, requiring a vast number of persons to be brought before the Court before the equities can be determined—the Court may adopt a process which was intended for a certain, quick, efficacious remedy on the part of the judgment creditor for recovering his debt by way of execution. In the present case, for instance, I am not sure whether it would not be necessary to have all the *cestuis que trust* under the will of the testatrix before the Court; and I cannot think that such a case is within the scope of the principle by which this Court assists those who, by reason of some mere technical difficulty at Law, are unable to obtain relief, or that it is such as was contemplated by the special provisions of the *Common Law Procedure Act*.

But independently of that, there is another, a totally distinct reason, why it would not be proper to grant relief in this case. It is quite clear that the moment the Plaintiff can establish a charge upon the Defendant's share in the profits, that instant the Defendant's interest ceases. And, accordingly, the Plaintiff can only

(1) 7 Ir. C. L. Rep. 261.

recover upon past profits—the subsequent profits would not be affected.

Now, it appears that before the filing of the bill the trustees, who were only bound to account every January, have, nevertheless, been so obliging to their *cestuis que trust* as to make up shorter accounts. One of them was made up in June, 1865, and *Cox's* share of the profits, or the principal part of it, amounting to £494, was paid over to the Plaintiff by virtue of an assignment by *Cox* of the moneys due to him. Subsequently the trustees made out another account up to Michaelmas for the Michaelmas quarter. A correspondence ensued with reference to that account. The Plaintiff claimed what was found due to *Cox*, but his claim was not acceded to, for at that time there was no charge of any description in his favour on these profits. Accordingly the Plaintiff filed his bill in November, and subsequently, by arrangement and consent, these profits were divided between the Plaintiff and *Cox*. That disposed of everything due to *Cox* up to that time, and nothing further would become due until Christmas.

Under these circumstances, then, could the Plaintiff establish any claim whatsoever? It appears to me that he could not, unless, as Mr. *Jessel* argued with great ingenuity, the charge was not to be considered effective till the actual decree, and then when the decree was made, he claims to fasten upon all the profits which accrued between the filing of the bill and the date of the decree. That may be a very convenient argument for a person in the peculiar position of the Plaintiff, for the moment he attaches the profits, all the subsequent profits vanish by virtue of the clause of forfeiture in the will; and therefore it is not his interest to fix the time at any earlier period than the decree. But supposing that I could assist him, as I think I cannot, by analogy to the cases at Law, it appears to me that I should be ill following that analogy if I were not to hold that the filing of the bill is the time when this charge would attach, as being equivalent to a Judge's order, which is notice on the part of the Plaintiff of his having a definite charge upon the property.

Otherwise, as soon as the bill was filed the judgment debtor would do all he could to prevail upon the trustees to pay him the money in their hands, which they might do until they were pre-

L. C. 1869 HORSLEY v. COX.

vented by injunction. Therefore it is the creditor's interest, in every case except where the Plaintiff is in such a peculiar position as in this suit, that, assuming the charge could be sustained at all the trustees should be prevented from dealing with the fund after a bill of this kind had been filed.

We come to the same result if we consider the analogy of the cases in which the Court has interfered to aid an execution where there is an outstanding legal interest. In that case all must be done at Law that can be done. The judgment creditor must get his writ of *fi. fa.*, and lodge it in the sheriff's hands before he can come to this Court to aid him; and, by analogy, there ought to be some corresponding process in the nature of an attachment against this debt before bill filed; and every right should exist, to make the analogy complete, at the time of filing the bill which the judgment creditor would have at Law, except for the legal obstacle which intervenes. Consequently the moment the bill is filed the trustees would be fixed, and would be precluded from making any payment over to the debtor. Under the circumstances of the present case, if the money had been in the hands of the trustees nothing would have been due at the time of filing the bill. There could not have been an attachment at Law, because the 61st section requires an affidavit that there is a debt due from the garnishee to the judgment debtor, which could not have been properly made. By the mode in which the business was carried on there could be nothing due to *Cox* until the actual ascertainment of the profits, which would be in December. They could not ascertain the profits before, because all the apparent profits might be gone before December, the time of stating the yearly accounts. Where the debt is unliquidated, it has been decided, even at Law, in the case of *Dresser* v. *Johns* (1), that it cannot be attached. I do not forget Mr. *Jessel's* argument, that the debt was accruing *de die in diem*, and that therefore up to the settlement of the account there would be something coming due. That is not so; the account could not be taken, and until you get a debt actually due the statute has no application.

It appears to me, therefore, upon this second ground, that if I could have seen my way to apply the doctrine of the Court of

(1) 28 L. J. (C.P.) 281.

Equity to this particular case, the facts would not have justified such an application. In either view, therefore, the appeal must be dismissed with costs.

L. C. 1869 HORSLEY v. COX.

Solicitors for the Plaintiff: Mr. *A. S. Lawson.*

Solicitors for the Defendant: Mr. *T. W. Flavell;* Messrs. *Bockett & Co.*

ABERAMAN IRONWORKS *v.* WICKENS.

L. C. 1868 Nov. 6, 9, 10, 25.

Vendor and Purchaser—Misrepresentation—Condition as to Acreage—Lien on Deposit—Position of Plaintiff—Jurisdiction—Practice—Parties—Costs of Defendants.

The owner of an estate agreed to sell it for £250,000, representing it to contain 1530 acres. The purchaser agreed to sell it to a company for £350,000, of which £150,000 was paid to him, £75,000 in cash, and bonds for £75,000, and he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than 1100 acres, and the company, having at the time only £1536 in hand, complained to the purchaser of the deficiency, and he then wrote to the vendor declining to complete. The company afterwards rescinded the contract, and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser and some other Defendants who had agreed to share with him, for a return of the £75,000 and of the bonds:—

Held, that although the financial position of the company might render it convenient to them to rescind the contract, and though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract as the purchaser was unable to complete with them:

Held, that the company were entitled to rescind on the ground of misrepresentation though they might have been able to ascertain the extent of the estate:

Held, that the company were entitled to repayment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of the £50,000 repaid to the purchaser, which had been paid into Court.

One of the articles of the contract provided that the estate as to extent of acreage should be taken to be conclusively shewn by certain deeds:—

Held, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the company from rescinding on the ground of deficiency in acreage.

The same relief was asked against the other Defendants as against the purchaser. One of these Defendants, by his answer, said that the suit was unnecessary and improper, another, that he was improperly made a party to the suit:—

Held, that they, whether necessary or not, were proper parties to the suit,

L. C.
1868
ABERAMAN IRONWORKS v. WICKENS.

but that no relief in the shape of repayment could be given against them, and that if they had merely submitted to any order which the Court might make they would have been entitled to their costs, but as they had answered in this manner they would not have their costs.

Decree of *Malins*, V.C., reversed.

ON the 23rd of June, 1864, Mr. *Crawshay Bailey*, the owner of the *Aberaman* estate in *Wales*, upon which he had for some time carried on ironworks and a colliery, agreed to sell the estate, plant, and business, to the Defendant *Wickens* for £250,000, representing, as was alleged by *Wickens* in this suit, that the estate contained 1530 acres. One of the clauses in the agreement provided that the title should commence with certain deeds of conveyance and leases, and another clause was, that "the estate as to extent of acreage and other matters of description shall be taken as conclusively shewn and defined by the said deeds of conveyance and leases without further evidence." *Wickens* paid £10,000 deposit, and made some agreements with the Defendant *Wilkinson*, who advanced part of the money, and with the Defendants *Sarl & Sudlow*, for sharing the profits. The Defendants then got up a company called the *Aberaman Ironworks, Limited*, the Plaintiffs in this suit, the object of which company was to buy and work the *Aberaman* estate, and the prospectus of the company stated the estate to contain 1530 acres. On the 27th of September, 1864, *Wickens* agreed to sell the estate to the company for £350,000, payable by instalments and in bonds, *Wickens* representing, on the faith, as he alleged, of *Crawshay Bailey's* statement, that the estate contained 1530 acres; and an agreement for sale was executed between *Wickens* and the company, corresponding with the agreement between *Wickens* and *Crawshay Bailey*. The company paid *Wickens* £75,000, and gave him bonds for £75,000 more, and by means of this money *Wickens* paid *Crawshay Bailey* the rest of a sum of £50,000 as part of the purchase-money, and repaid the other Defendants their advances. Both *Wickens* and the company employed surveyors to examine and report on the estate, and the surveyors for the company, under the circumstances stated by His Lordship in the judgment, represented that the estate contained 1510 acres. On the 20th of January, 1865, there was a meeting of directors of the company, and *Sarl*, who was one of the directors, was stated to have then informed

the others that the estate contained little more than 1000 acres, and the directors then handed to *Wickens* a letter calling upon him for explanation. *Wickens* said that he could give no explanation, and on the same day wrote to *Crawshay Bailey* saying that he had received this information, and declining to complete unless it could be shewn that the estate contained 1530 acres, and saying that he would hold *Crawshay Bailey* liable for damages. Proposals were made between the company and *Wickens*, and between *Wickens* and *Crawshay Bailey*, for a continuation of the contract on a reduction of the purchase-money, but no arrangement was made, and on the 24th of March the company gave notice to *Wickens* that they had rescinded the contract. On the 4th of April *Wickens* brought an action against *Crawshay Bailey* for a return of the £50,000, and for £100,000 damages. This action was afterwards compromised by *Crawshay Bailey* repaying the £50,000, £25,000 in cash and £25,000 in five bills of £5000 each, and by the agreement being abandoned. On the 10th of June, 1865, the company was ordered to be wound up, and on the 5th of September, 1865, the original bill in this suit was filed. It was afterwards amended, and as amended was by the company and *W. Quilter*, the official liquidator, Plaintiffs, against *Wickens*, *Wilkinson*, *Sudlow*, and *Sarl*, and also two persons named *Folch* and *Bennet*, with whom *Wickens* had agreed to share, as Defendants; and the bill prayed declarations that the contract between the company and *Wickens* might be declared void, and that the Defendants were jointly and severally liable to repay the £75,000 and to deliver up the bonds, and that they might be restrained from negotiating the bonds. The Defendant *Wickens*, by his answer, took the several points mentioned in the arguments and judgment, and alleged that he had applied the proceeds of some of the bonds to the purposes of the company. He also alleged, and it was not denied, that, at the time of the meeting of the 20th of January, the company had only £1536 at their bankers. The other Defendants answered as stated in His Lordship's judgment.

Wickens had received the proceeds of four of the bills of exchange, but one remained unpaid, and the proceeds of this were brought into Court in this suit.

The cause came on to be heard before the Vice-Chancellor *Malins*,

L. C. 1868

ABERAMAN IRONWORKS v. WICKENS.

who dismissed the bill with costs, without prejudice to the rights of the Plaintiffs at law, as reported (1), where the facts are more fully stated.

The Plaintiffs appealed.

Sir *Roundell Palmer*, Q.C., and Mr. *Ferrers* (Mr. *Roxburgh*, Q.C., with them), for the Plaintiffs:—

Even admitting that *Wickens* was deceived, he made a representation to the company which deceived them. *Attwood* v. *Small* (2), which was relied upon in the Court below, does not apply to such a case. The Vice-Chancellor thought that our remedy was at Law, but we could not get back the bonds at Law, *Athenæum Life Assurance Society* v. *Pooley* (3), or establish the lien which we have on the money: *Wythes* v. *Lee* (4); *Rose* v. *Watson* (5).

Mr. *Karslake*, Q.C., for *Wickens*:—

The company made default, and were unable to complete their agreement with *Wickens*, and have, therefore, no remedy against him. *Crawshay Bailey* sold to *Wickens* the estate as he held it, and *Wickens* in the same way sold it to the company; the mistake probably arose from some confusion as to acres, and there was no fraud or intentional misrepresentation. The company had every opportunity of ascertaining the extent: *Attwood* v. *Small*; *Jennings* v. *Broughton* (6). They only looked at the coal and iron ore, and the extent of acreage was immaterial. If the company had been prosperous, the purchase would have gone on, but they had no money, and invented this excuse for getting off their contract. If the company have any remedy against *Wickens* it is by an action at law for damages for misrepresentation. When they rescinded the contract they gave up all lien; if they meant to take any steps to establish it they should have proceeded to do so whilst *Wickens* was negotiating with *Crawshay Bailey*; there is now no land, and nothing on which to claim a lien. There is no connection between the company and *Crawshay Bailey*, and the company have no lien on money merely because it comes from

(1) Law Rep. 5 Eq. 485.
(2) 6 Cl. & F. 232.
(3) 3 De G. & J. 294.
(4) 3 Drew. 396; 2 Jur. (N.S.) 7, 130.
(5) 10 H. L. C. 672.
(6) 5 D. M. & G. 126.

Crawshay Bailey. This money is not ear-marked or affected in any way, and the only possible remedy is in the shape of an action for damages: *Sainsbury* v. *Jones* (1).

Mr. *Glasse*, Q.C., and Mr. *Pearson*, Q.C., for *Wilkinson*, said that he had no interest whatever in the matter, and ought not to have been brought before the Court; he ought to have his costs from the Plaintiff.

Mr. *Willis*, for *Sudlow*:—

The company had never anything to do with *Sudlow*, and have always treated with *Wickens*. *Sudlow* claimed no interest whatever, and only wanted his costs.

Mr. *G. Hastings*, for *Sarl*:—

On a bill filed for specific performance all parties interested in resisting it need not be before the Court; this is a bill to rescind a contract, and none but the alleged contractor need be a Defendant.

Sir *Roundell Palmer*, in reply:—

Wickens has withdrawn his charge of fraud against *Crawshay Bailey*, and has only got back his deposit, on which we have a lien. We had a lien on the estate for whatever we had paid, and we do not lose it by his getting back the money; in fact, he ought not to have received it, but to have handed it over to us. We have a right to come here to establish our lien, and to prevent the bonds from being dealt with, which remedies we could not get at Law.

Nov. 25. LORD CAIRNS, L.C., after stating the principal facts in the case, said that, in his opinion, the condition in the agreement as to the extent of acreage did not disable *Wickens* from complaining of the inaccuracy of the statement as to the quantity. The condition, construed literally, was not necessarily inconsistent with that statement, and was no more than a conveyancing provision as to identity—that the estate sold, represented as consisting of 1530 acres, should, as to its extent of acreage

(1) 5 My. & Cr. 1.

L. C. 1868

ABERAMAN IRONWORKS v. WICKENS.

and other matters of description, be taken to be conclusively identified by the title deeds. In other words, reading the representation into the condition it would run thus:—"The *Aberaman* estate, which consists of 1530 acres, shall, as to the extent of acreage and other matters of description, be taken as conclusively shewn and defined by the deeds of conveyance and leases without further evidence." His Lordship then continued:—Mr. *Wickens* on receiving the letter from the company complaining of the deficiency might have proceeded, if he had it in his power to do so, to shew that the acreage was as large as it had been represented, or that there was, at all events, no such deficiency as would authorize a rescission of the contract, or he might have insisted, if he had a case to do so, that the company had themselves such information upon the subject that they could not have been misled; and, proceeding to complete his contract with Mr. *Bailey*, he might have called upon the company to perform specifically their contract with himself.

Neither of these courses was taken by Mr. *Wickens*. He adopted the complaint of the company, and made it in turn the ground of a complaint and of a repudiation of liability on the contract between himself and Mr. *Bailey*. He endeavoured to obtain a large reduction of price from *Bailey*, offering a corresponding reduction to the company, and, failing in this, he commenced his action against *Bailey* to recover back from him the £50,000 he had paid, and damages.

Under these circumstances I entertain no doubt that there was not any time after the 20th of January, 1865, at which *Wickens* was in a position to fulfil his contract with the company; that he put it out of his power to do so by the course which he took, and that the company were fully entitled on the 24th of March, 1865, to give to *Wickens* the notice of rescinding the contract which on that day they gave.

The contract being rescinded, the natural result would be, that as the £50,000 paid to *Bailey* had been restored to *Wickens*, so the latter should pay back to the company the sums which he had received in cash on account of the purchase and the bonds of the company, so far as they were under his control.

Against this, however, *Wickens* makes various objections. He

contends that by the conditions as to acreage, the company are estopped from questioning the real measurement; that there is no evidence in this cause that the acreage is really deficient; that the company had before the contract a full inspection and opportunity of knowing the real size of the estate; that the company, even had they known that the estate consisted of less than 1100 acres, would have bought it at the same price as readily, and that the company rescinded the contract rather because they had a difficulty in procuring funds than because of a deficiency in acreage.

It appears to me that no one of these objections is relevant if I am right in holding, as I do, that *Wickens* was not in a position, and never put himself into a position, to complete or to call on the company to complete the contract. The company are not here resisting specific performance, but calling for an adjudication as to rights arising out of the rescission of a contract which could not be performed. I will, however, passing from this observation, advert to the objections in detail.

The remarks I have made upon the condition as to acreage as between *Wickens* and *Bailey* apply equally as between *Wickens* and the company. As to evidence of the deficiency, that appears to me to be unnecessary. *Wickens* has recovered against *Bailey* on the footing of the deficiency, and cannot now be heard to dispute it. In point of fact, he does not dispute it in his answer or his evidence, and it has been assumed throughout in all the correspondence and negotiations between the parties.

As to the knowledge possessed by the company before the contract on the subject of the acreage, there was, on the one hand, the distinct representation of *Wickens* already adverted to, which was introduced into the prospectus, and the same prospectus in the same sentence stated that the estate had been carefully surveyed by Mr. *Richardson*, who (as was admitted at the Bar) was a surveyor employed by *Wickens*. It appears, also, that on the 26th of August, 1864, three of the directors and Mr. *Blackwell*, a valuer of eminence, were appointed to go down and examine the works. It further appears that on the same day the Defendant *Wilkinson*, who had been present with *Wickens* at the board of directors, wrote to *Wickens* thus :—"I think you should take care that Mr. *Jones* and Mr. *Richardson* are both at the works when the

L. C. 1868

ABERAMAN IRONWORKS v. WICKENS.

valuer of the board goes over them, and when the committee are there on Wednesday Mr. *Jones* will be wanted to point out the works, and Mr. *Richardson* to justify his report." *Jones*, it was admitted at the Bar, had, as well as *Richardson*, been employed by Mr. *Wickens*. On the 28th of August, 1864, *Richardson* writes thus to *Wickens*:—"I shall proceed to *Aberdare* as you wish to meet Mr. *Blackwell* and the directors. I shall take all the details of my measurements, weight, and calculations with me, so as to satisfy Mr. *Blackwell* of the accuracy of my estimates." *Blackwell* made his report, dated the 31st day of August, 1864. It has been put in evidence, and it states, among other things, that the estate consists of 1510 acres of land and mines. It is not shewn or alleged that *Blackwell* actually surveyed the estate, and the suggestion must be, not that the directors knew the real acreage, but that they were misled by their own agent, *Blackwell*. They had, however, the distinct representation of *Wickens* on this head, professed to be founded on *Richardson's* survey, and if it were material to form an opinion on this part of the case, the inference I should have drawn from what took place between the 26th and the 31st of August would be, that a valuation rather than a survey was in the minds of the directors, and that *Jones* and *Richardson* were brought forward on the part of *Wickens* to supply *Blackwell* with measurements.

I may add, that if *Wickens* supposed that the company either knew, or were to be treated as if they knew, the real acreage of the estate, it is surprising that no suggestion to that effect was made by him on the 20th of January, 1865, when they first complained of the deficiency, or for a considerable time afterwards.

The argument that the company would have bought the estate with equal readiness had they known it to consist of less than 1100 acres, and that their real reason for rescinding was want of money to complete, appears to me hardly to require an answer. If the deficiency is one which entitles them to rescind (and no one disputes that it is) they are entitled to rescind, even although they might have been willing to pay an equal sum for the smaller quantity, and even although rescission may, in a financial point of view, have been convenient to them.

It was then contended, on the part of *Wickens*, that whatever

rights the company might have against him arising out of the rescission of the contract, they should be enforced at Law, and not in this Court; and this view appears to have been adopted by the Vice-Chancellor, who has dismissed the bill without prejudice to any remedy at Law. With great deference to His Honour, I cannot think that there is any difficulty as to the jurisdiction of this Court. *Wickens*, though he admits the fact of the notice of the company to rescind, appears to deny their title to rescind, and at first was disposed to insist on a forfeiture of the money paid, though this was not seriously contended for at the Bar. But, apart from there being a question to be determined as to the right of the company to rescind the contract, the contract is one which, if not declared to be at end, would subject the company to still further liability in the shape of payment. Bonds of the company, moreover, have been given under it, which, in their view of the case, they are entitled to have restored, and as to which it is not an answer to say that there would be technical difficulties in the way of putting them in suit. These considerations, not to speak of the lien for the paid purchase-money, to which I shall afterwards advert, appear to me to be amply sufficient to sustain the equity of the bill.

The Defendant *Wickens*, then contended that he had made payments, and was under liability by himself and his nominees, on shares of the company, which should be provided for out of the money and bonds which he had received. It is sufficient to say, that I can find no evidence of any payments made by *Wickens* on behalf of the company, and that there is nothing in his agreement to take shares which would, even as between himself and the company, absolve him from the ordinary liability upon him in the event of the purchase of the estate going off.

I have next to advert to the demand which is made on the part of the Plaintiffs for a lien in respect of the purchase-money which has been paid. That question stands thus:—£50,000 was paid by *Wickens* to *Bailey* on account of the purchase of the estate. According to the decisions which were referred to—the case of *Wythes* v. *Lee* (1), and the case of *Rose* v. *Watson* (2)—*Wickens*, in the event of the purchase going off, would have a lien for this

(1) 3 Drew. 396. (2) 10 H. L. C. 672.

9 Jur. N. S. 136 L 2 10 Jur. N. S. 997 1

L. C. 1868

ABERAMAN IRONWORKS v. WICKENS.

£50,000 upon the *Aberaman* estate belonging to *Bailey*. In like manner the company, in their turn, for the purchase-money which they paid *Wickens* would, in the event of their contract going off, have a lien upon any interest which *Wickens* might possess in the *Aberaman* estate; and, according to the decisions to which I have referred, *Wickens*, to the extent of the £50,000 he paid, had become in equity the owner, by way of incumbrance, of a corresponding amount in value on the *Aberaman* estate. It appears to me, therefore, upon the authority of those decisions, to be clear that the company, supposing the £50,000 had not been repaid by *Bailey* to *Wickens*, would have been entitled to maintain a bill against *Wickens* and *Bailey* to prevent the money getting back into the hands of *Wickens*. In point of fact, when the bill was filed, the £50,000 had in part been repaid to *Wickens*, but part of the amount remained *in specie* in the form of a bill of exchange of *Bailey's* which had not been paid. This bill of exchange was intercepted by the injunction of the Court; and in respect of it I find £6232 is now in Court. Upon that sum it appears to me the Plaintiffs in this suit have established their right to a lien. The decree of the Vice-Chancellor, therefore, must, in my opinion, be reversed; and a decree must be made directing an account of the purchase-money paid by the company to *Wickens*, and repayment of it, with interest at 4 per cent from the time of payment. A time must be fixed for that repayment. The bonds remaining in the possession of *Wickens* must be delivered up; and he must be ordered to concur in the delivery of some which are with the *London and County Bank*. The Plaintiffs, in my opinion, are entitled, as against *Wickens*, to the costs of the suit, and they are entitled to treat the money remaining in Court as a security for what under this decree will be coming to them and to be paid over to them in case of default in payment by *Wickens*.

It only remains to consider the case of three other Defendants, *Wilkinson*, *Sudlow*, and *Sarl*. Their position is this:—They were not originally parties, and they never have, in any way, become parties to the contract between the company and *Wickens*. If this were a suit for specific performance it is quite clear, upon the authority of *Tasker* v. *Small* (1), and upon the ordinary prin-

(1) 3 My. & Cr. 63.

ciples of the Court, that they would be improper parties to the suit. But it appears from the evidence that in the contract which *Wickens* made with the company they, beyond all doubt, had a certain amount of interest—a different amount in the case of the different Defendants; and, without going through the documents at length, it is sufficient to say that it is my opinion, looking to the documents, that in equity, *Wilkinson, Sudlow,* and *Sarl,* had all of them a certain amount of interest in, and control over, the contract which *Wickens* had made with the company, and the benefits which *Wickens* might derive under that contract.

In that view of their position it appears to me that in a suit which seeks to annihilate and rescind that contract, *Wilkinson, Sudlow,* and *Sarl,* may properly be made parties. I do not go so far as to say that if they had not been made parties, and if *Wickens* had not required them to be made parties, the suit would have been defective, but it appears to me that the Plaintiffs seeking to rescind that contract had a right to make those persons parties who they knew had acquired an interest in the contract.

The bill, however, goes further than to ask that the contract may be rescinded and terminated in their presence. It asks that they may be ordered, jointly and severally, along with *Wickens,* to repay the sums of money which *Wickens* has received on account of the contract. Some part of those moneys seem to have come into the hands of the Defendants *Wilkinson, Sudlow,* and *Sarl,* or one or more of them. But it appears to me that, even assuming that a part of the money may have come into their hands, that was not money obtained by fraud or impressed with any trust, and that they, therefore, are under no liability to repay it, but that *Wickens* was at liberty to dispose of that money as he pleased, subject, of course, to the obligation, in the event of the purchase going off, to repay the money. As against *Wilkinson, Sudlow,* and *Sarl,* therefore, it appears to me there can be no relief in the shape of repayment of the money.

The result is, that they have rightly been made parties to the suit, but that more relief than the Plaintiffs were entitled to has been prayed by the bill. Now, if these Defendants had by their answers submitted to any order the Court might make as to this contract between the company and *Wickens,* I should have thought

L. C. 1868 ABERAMAN IRONWORKS v. WICKENS.

they were entitled to their costs of the suit. But in place of doing that, I find that as to the Defendant *Sudlow*, he has contended by his answer that the suit is unnecessary and improper; and as regards the Defendant *Sarl*, he contends that under the circumstances what had been paid in money and bonds had been forfeited, and became the absolute property of the Defendant *Wickens*; and as regards the Defendant *Wilkinson*, he also submits that he is improperly made a party to the suit, and that there is no equity on the part of the Plaintiffs to maintain the bill as against him.

I think, therefore, that the result is, that although these gentlemen were proper and material parties to the suit, the Plaintiffs were in error in the relief which they prayed against them, that the Defendants themselves were in error in the attitude they have assumed in their answers, and that I shall do proper justice between the parties by saying that as to them there shall be no costs.

Solicitors for the Plaintiffs: Messrs. *Maynard, Son, & Co.*

Solicitors for the Defendants: Mr. *H. Wickens;* Messrs. *Stevens, Wilkinson, & Harries;* Mr. *R. Davis;* Mr. *Vining;* Messrs. *Hillyer & Fenwick.*

L. C. 1868 *Nov.* 12.

In re TRENT AND HUMBER COMPANY. *Ex parte* CAMBRIAN STEAM PACKET COMPANY.

Winding-up—Continuing Damages—Delay—Measure of Damages—Profits—Companies Act, 1862, s. 158—25*th Rule of the General Order of* 11 *Nov.* 1862.

A ship-building company agreed to repair a ship within a certain time. Before the repairs were executed an order was made for winding up the company. After some time an order was obtained in the winding-up, with the assent of the shipowners, that the official liquidator should be at liberty to complete the repairs; which he did, and the ship was, long after the time agreed upon, delivered to the owners and sent on a voyage:—

Held, that the shipowners were entitled, under sect. 158 of the *Companies Act*, 1862, to recover damages from the company for the delay in executing the repairs, and that these damages continued to run after the winding-up, notwithstanding the 25th rule of the General Order of 11 Nov., 1862:

But, *held*, that, under the circumstances, the shipowners could not recover

damages for an injury to the ship alleged to have been done whilst she was in the possession of the company.

Order of *Wood*, V.C., affirmed.

Order of *Giffard*, V.C., varied.

L. C.

1868

In re TRENT AND HUMBER CO.

Ex parte CAMBRIAN STEAM PACKET CO.

ON the 6th of April, 1865, the *Trent and Humber Ship-building Company, Limited,* entered into a contract with the *Cambrian Steam Packet Company, Limited,* to repair the ship *Plynlymon* upon certain terms, and within a period which was extended to twenty weeks. The ship was accordingly delivered to the *Ship-building Company* for the purpose of being repaired. On the 21st of July, 1865, the *Ship-building Company* was wound up, and nothing further was done to the ship. After much correspondence an order was made in the winding-up, with the assent of the *Cambrian Company,* that the official liquidator might be at liberty to complete the repairs to the ship, according to the contract. The repairs having been completed, the ship was on the 17th of May, 1866, delivered over to the *Cambrian Company,* who gave a mortgage for £1950 by way of security for payment of the cost. In May, 1867, the official liquidator took out a summons to enforce payment of the £1950, and the *Cambrian Company* then claimed £2000 as damages for the non-delivery of the ship at the proper time, and on the 24th of July, 1867, the Vice-Chancellor *Wood* made an order in the winding-up that the *Cambrian Company* might be at liberty to go in and prove for any damage accrued to them from the delay. The *Cambrian Company* then carried in three claims:—1. For £2000 damages for the delay; 2. For £2500 loss consequent on the depreciation of the vessel from her not being delivered in proper time; 3. For £3184 expended in repairing damage alleged to have been done to the ship whilst lying on the mud in the *Ship-building Company's* slip. As to the first claim, evidence was given of charter-parties which might have been effected if the ship had been ready. As to the second, it was shewn that steam-ships had seriously fallen in value during the time. And as to the third, it was alleged that the bottom of the vessel had been seriously bent or deflected whilst lying on the slip, which damage could not be discovered when the ship was first delivered. But it appeared that the surveyor of the *Cambrian Company* had accepted the ship, and that she had been a voyage before the claim was made.

L. C. 1868 — *In re* Trent and Humber Co. — *Ex parte* Cambrian Steam Packet Co.

The Vice-Chancellor *Giffard*, before whom the matter came upon adjourned summons on the 1st of June, 1868, disallowed the second claim, but held upon the first claim, that the *Cambrian Company* were entitled to prove for the net profits, if any, which, under the circumstances, the company might have obtained, and upon the third claim that the *Cambrian Company* must prove for the amount which it would have cost to rectify the bottom of the vessel at the time when she was delivered. The case is reported (1), where the facts are more fully stated.

The official liquidator appealed against both the orders, that of the Vice-Chancellor *Wood* and that of the Vice-Chancellor *Giffard*.

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the Appellants:—

The *Cambrian Company* had no right to damages at all after the winding-up. Whatever damages were due ought to have been ascertained at the time when the order to wind up was made, and no subsequent claim can be allowed under 25 & 26 Vict. c. 89, s. 158, and the 25th rule of the General Order of the 11th of November, 1862. That section and Order stop everything, and the company can incur no more liabilities. The *Cambrian Company* knew that the *Ship-building Company* were wound up and could not complete the contract, and they might have taken the ship away or have employed their own men. The order to repair the ship was obtained by the official liquidator at the desire of the *Cambrian Company*, and nothing was then said about damages. Moreover, damages are not of course in such a case. A man might contract to repair part of a mill for a few shillings, and if he did not do it could he be liable for all the loss from the stoppage of the mill? But, admitting that damages can be claimed, it is absurd to suppose that they ought to be measured by the amount which the ship would have earned as freight during the time, supposing her to have been in constant employment and without any deduction for general depreciation. The true measure is the average profit of a ship of this class during the time. The rule on the subject is laid down in *Hadley* v. *Baxendale* (2); *Gee* v. *Lancashire and Yorkshire Railway Company* (3); *Cory* v. *Thames Ironworks Com-*

(1) Law Rep. 6 Eq. 396. (2) 9 Ex. 341.

(3) 6 H. & N. 211.

pany (1). As to the expenses on account of the alleged damage to the ship, she was accepted by their surveyor and sent a voyage, and the claim is altogether an afterthought.

Mr. *Druce*, Q.C., and Mr. *Babington*, were stopped by the Lord Chancellor as to the first appeal. As to the third part of the claim they contended that the ship was proved to have been damaged whilst lying so long on the slip, and that the damage could not have been discovered until the ship was laid ashore, and that was not done until her return from the voyage.

Lord Cairns, L.C.:—

I will first address myself to the order of the 24th of July, 1867, made by Vice-Chancellor *Wood*. I have no doubt that the claim which was made by the *Cambrian Company* is a claim coming within the 158th section of the Act of 1862. It is a claim for damages—damages which were contingent to some extent—because as to part of the claim it could not be ascertained at the time of the winding up of the company what the damages would amount to. Some damage had apparently been sustained at the date of the winding-up, but there was at that time a continuing breach of the contract going on, and until that breach came to an end, or was in some manner adjusted, the damages would also continue to run.

It appears to me that the 25th rule of the Order of November, 1862, does not in any way qualify the effect of the 158th section; if it did qualify it, there would then arise a question whether the 25th rule was not open to the observation which has been made upon the 26th, that it is *ultrà vires*, because the Orders were to be Orders for regulating the proceedings in winding-up, and were not intended to qualify any of the rights given by the Act. But the 25th rule only says that where there are debts and claims admitted to proof under the 158th section, they are to be estimated, as far as possible, according to the value at the time of the order to wind up; but if there is a contract broken, and the damage is a continuing damage, the amount of which you cannot ascertain until you know when it will stop, it may not be possible to esti-

(1) Law Rep. 3 Q. B. 181.

L. C. 1868

In re Trent and Humber Co. *Ex parte* Cambrian Steam Packet Co.

mate that value at the date of the winding-up, and then you must estimate it in some other way.

Then the claim which was the subject of the order of the 24th of July, 1867, is described in the order in this way:—"Damage which has accrued to the *Cambrian Company* from the delay in the completion of the contract of the 6th of April, 1865." It appears to me that to compensation for that damage the *Cambrian Company* were entitled. There was a contract to take the ship into the possession of the *Humber Company* and to repair and alter her for a certain fixed sum and by a fixed day. That contract was, beyond all doubt, broken, and damages would therefore be recoverable. The only argument against the right to some sort of damages for the breach of the contract was that which arose out of the correspondence between the official liquidator and the *Cambrian Company*. The ship was ultimately repaired by the official liquidator, some part of the money having been already advanced by the *Cambrian Company*, and she was finally, in the month of May, 1866, delivered over to the *Cambrian Company*. The effect of that seems to be simply this, that the damage which I have called a continuing damage was in that way put a stop to, but not till the ship was delivered over. If the ship had not been delivered over till May, 1867, the damage would have been running on still, and a larger sum would have been recovered. There is nothing in the negotiations for finishing the ship which appears to me to prejudice the claim of the *Cambrian Company* to damages. On the contrary, damages were expressly claimed by them, and in the order to deliver up the ship are expressly reserved the rights of all parties under the contract. I therefore think that the order of the Vice-Chancellor of the 24th of July, 1867, was warranted by the Act of Parliament, was warranted by the circumstances of the case, and was not in any way affected or prejudiced by any agreement between the parties, and, therefore, on the first appeal what I ought to do is to dismiss it with costs.

[As to the third claim in the second order, that for damages for the expense incurred in rectifying the alleged deflection, His Lordship, without expressing any opinion as to the merits of that claim, considered that after the affidavits and letters in which this claim was not mentioned, after the order made by the Court, and after the

company and their surveyor had so long known the state of the vessel, it was too late to raise a fresh claim in the manner in which this had been raised, and the order of the 1st of June, 1868, must be varied in that respect. In other respects His Lordship would leave the second order standing, though he should have thought the first order sufficient for all purposes. But in estimating the net profits, the question was open, whether there was not to be taken into account the wear and tear and depreciation which the ship would undergo in earning those profits.]

The appeal as to the first order must be dismissed with costs, to be paid by the official liquidator; and without costs as to the second order: the official liquidator to have leave to apply in the winding-up for the costs which he might have to pay to the Respondent, as well as for his own costs.

Nov. 13. The LORD CHANCELLOR further said that as to the measure of the damages he had proceeded on the principle that if a profit would arise from a chattel, and it is left with a tradesman for repair, and detained by him beyond the stipulated time, the measure of damages is, *primâ facie*, the sum which would have been earned in the ordinary course of employment of the chattel in the time.

Solicitors: Mr. *C. P. Froom;* Messrs. *Oldman & Co.*

CLINCH *v.* FINANCIAL CORPORATION.

Company—Amalgamation—Ultrà Vires—Liabilities—Dissentient Shareholder—Suit on behalf of others—Delay.

A company agreed to amalgamate with or purchase the goodwill and property of another company in consideration of 25,000 shares in the purchasing company to be allotted amongst the shareholders of the selling company; the assets of the selling company were to be applied in payment of its liabilities, and then in payment of £6 a share on each of the 25,000 shares; and if the assets were insufficient, a call was to be made on the shareholders in the selling company:—

Held, that such an arrangement, by which liabilities were imposed on the

L. C. and L. JJ.

1868

CLINCH v. FINANCIAL CORPORATION.

shareholders, was void as *ultrà vires*, and could not be supported under s. 161 of the *Companies Act*, 1862:

Semble, that such an arrangement would be void, even if only the shareholders who assented to it were to be bound by it.

Such an arrangement will be set aside in a suit by a dissentient shareholder of the selling company on behalf of himself and all the other shareholders, although a large number of the shareholders had assented to it, and the arrangement had actually been carried into effect.

The arrangement was made at the end of May; a dissentient shareholder signified his dissent early in June, and continued to do so until November, when he filed a bill to have the arrangement set aside:—

Held, that his suit was not barred by his delay.

Decree of *Wood*, V.C., affirmed with a variation.

THIS was a suit by a shareholder in a company called the *Financial Corporation, Limited*, on behalf of himself and all the other shareholders, except those named as Defendants, against the *Financial Corporation* and the *Oriental Commercial Bank, Limited*, and nine of the directors of the *Corporation*, and nine of the directors of the *Bank*, to set aside an arrangement which had been made for the amalgamation of the two companies.

The *Corporation* was registered in 1863 with a capital of £3,000,000, in 150,000 shares of £20 each, of which 75,000 only had been subscribed for, on which £2 had been paid, the objects being the undertaking, assisting, and participating in financial, commercial, and industrial operations and undertakings in *England* and abroad; and by one of the articles of association the directors were empowered, upon such terms as they thought fit, to amalgamate with any company carrying on any business included among the objects of the *Corporation*.

The *Bank* was registered in 1864 with a nominal capital of £3,000,000, of which the first issue was to be £150,000, in 75,000 shares of £20 each, £5 paid, the objects being the carrying on mercantile, exchange, banking, and agency business of all kinds, and the directors were empowered to purchase the business of, or amalgamate with any firm or body corporate.

On the 24th of March, 1865, the directors of the *Corporation* and the directors of the *Bank* entered into an agreement for an amalgamation or sale, the principal terms of which were, that one share in the *Bank* should be granted to the members of the *Corporation* for every three shares in the *Corporation*, so that 75,000

shares in the *Corporation* should be replaced by 25,000 shares in the *Bank*; that liquidators of the *Corporation* should be appointed who should satisfy the claims of all creditors, and also specially those of the *Bank* arising out of these conditions, after which the *Corporation* should be dissolved; that the 25,000 shares granted to the present members of the *Corporation* in exchange for their shares should be credited with £4 each, subject to the provisions thereinafter mentioned; that the funds collected by the liquidator should, after meeting the liabilities of the *Corporation*, be applied towards making up £6 (to be credited as £5) for each of the 25,000 shares; that if within a reasonable time the assets of the *Corporation* should not have been sufficient to cover these requirements, the liquidator should make a special call or calls to such amount as might be requisite upon the members of the *Corporation*, and should appropriate the proceeds accordingly.

The general effect of the arrangement was, that the *Bank* would take over the goodwill and all the property of the *Corporation* in consideration of 25,000 shares in the *Bank* (taken as £5 paid) to be allotted to the shareholders of the *Corporation*; that the assets of the *Corporation* were to be applied first in payment of the debts and liabilities of the *Corporation*, and then of £6 on each of the 25,000 shares in the *Bank*, or £150,000 altogether; and if the assets were insufficient, then a call was to be made on the members of the *Corporation* to make up the deficiency.

Notice of this agreement was given to the members of the *Corporation*, and an extraordinary meeting was held on the 12th of April, where resolutions were passed for the amalgamation and for a voluntary winding-up, and these resolutions were affirmed at another general meeting on the 9th of May, 1865. A deed was then made between the companies for carrying these arrangements into effect, and in this deed the transaction was called and treated as a purchase. In June, 1865, the Plaintiff expressed his dissent, and on the 10th of November, 1865, he filed his original bill in this suit, making allegations of fraud as to the amalgamation, and alleging that the directors had not power to enter into such an agreement.

The Vice-Chancellor *Wood*, before whom the cause was heard, was of opinion that the agreement was beyond the powers of the directors or of any general meeting, and was not binding on the

L. C. and L. JJ. 1868 CLINCH v. FINANCIAL CORPORATION.

Plaintiff, and made a decree accordingly. The Vice-Chancellor *Wood* also held that some of the charges of fraud were proved. The facts are stated in more detail in the report of the hearing before the Vice-Chancellor (1).

The *Bank* appealed, and the appeal was heard before the full Court.

Sir *Roundell Palmer*, Q.C., Mr. *Druce*, Q.C., and Mr. *Macnaghten*, for the *Bank*:—

The first objection to this suit is, that it is not competent to the Plaintiff to maintain such a suit on behalf of the other shareholders, when the large majority of them, in fact, have accepted the arrangement: *Carlisle* v. *South-Eastern Railway Company* (2); *Richardson* v. *Larpent* (3). A large number of the shares in the *Bank* have been accepted by the shareholders of the *Corporation* in lieu of shares in the *Corporation*, and they ought to be represented; the Court must consider the rights of those who have accepted the arrangement, and who cannot be reinstated. How is the Plaintiff injured? By the agreement all the assets of the *Corporation* were to be applied in liquidation of the liabilities, and he would be always liable to calls if there was a deficiency, whether the amalgamation had been made or not. The *Era Company's Case* (4) was a stronger case. Moreover, the arrangement does not bind dissentients, who can have their shares valued and paid for, and the case is provided for by sect. 161 of the *Companies Act*, 1862. This case comes well within the provisions of that section.

Mr. *W. M. James*, Q.C., and Mr. *A. E. Miller*, for the Plaintiff, were not called upon.

Mr. *Kay*, Q.C., Mr. *Pearson*, Q.C., Mr. *Eddis*, Mr. *Haddan*, Mr. *C. T. Simpson*, Mr. *Marten*, and Mr. *Fischer*, for the other Defendants.

Nov. 6. LORD CAIRNS, L.C.:—

1868 370

The arrangement between the *Oriental Commercial Bank* and the *Financial Corporation*, which, in the papers in this case, and in

(1) Law Rep. 5 Eq. 450.
(2) 1 Mac. & G. 689.
(3) 2 Y. & C. Ch. 507.
(4) 1 D. J. & S. 29.

the argument before us, has been called an amalgamation or combination, was in substance a transfer by the *Corporation* to the *Bank* of the business, goodwill, connection and property of the former in consideration of 25,000 shares in the latter. [His Lordship then stated the substance of the deed made between the companies, and stated that the provision for making good the assets was, in substance, a provision that if the surplus assets of the *Corporation*, after paying the debts, should not amount to £150,000, the deficiency should be made good by a call on the members of the *Corporation*.]

The Plaintiff *Clinch*, a shareholder in the *Corporation*, objected to and dissented from this arrangement. He complains that it is *ultrà vires* the *Corporation*, and he filed this bill on behalf of himself and all the other members of the *Corporation*, except the Defendants, to restrain the arrangement from being carried into effect.

It was admitted in the argument, and, indeed, it could not be denied, that there was no power in the special constitution of the *Corporation* which would warrant an arrangement of this nature, and that if it could be supported at all it must be supported under the provisions of sect. 161 of the Act of 1862. Nor could it be denied that if the meaning of the documents on which the arrangement rested was that all the shareholders in the *Corporation* were to be made to guarantee that the assets after paying all debts were equal to £150,000, and that this guarantee was to be enforced by a call on all the shareholders, the arrangement could not be supported. This, I say, could not, in my opinion, be denied, because I think that sect. 161 clearly contemplates a sale of the assets of the liquidating company for such an equivalent in value as is pointed out in that section, and does not contemplate the subjecting of the shareholders in the liquidating company, without their unanimous consent, to a fresh and original liability in the shape of a guarantee.

But it was argued that the meaning and intent was, that the call to make good this guarantee should be made on those only who accepted shares in the *Bank*, and thus assented to the arrangement. This is a question of construction, and has to be answered by a reference to the documents. Before, however, referring to them, I

L. C. and L. JJ.

1868

CLINCH v. FINANCIAL CORPORATION.

wish to say that, although it is not necessary to decide, still I entertain a strong opinion that even if the construction were such as is contended for by the Appellants, namely, that those persons only who accepted shares in the *Bank* should be subjected to this call, still the arrangement is one which would not be within the provisions of sect. 161. It is sufficient to say that, in my opinion, the liquidators of a company would have no right to place a shareholder of a company in this position, that he must either dissent altogether from the arrangement, and be subject to have his shares taken from him at a valuation, or else come in under the arrangement—and thus be forced to subject himself to the liability of guaranteeing the sufficiency of the assets. [His Lordship then commented on the different documents, and continued:—] It is impossible, therefore, in my opinion to put any construction upon these provisions except that there was to be a call for the purpose of giving effect to the guarantee, and that that call was to be made upon all members of the *Corporation*, whether they assented to or dissented from this arrangement. If that be so, the arrangement is one which, in my opinion, is clearly not authorized by sect. 161 of the Act of 1862, and the Plaintiff was entitled to object to it.

It was argued, however, that a large number, and, indeed, a majority of shareholders in the *Corporation* had assented to the arrangement, and had actually taken shares in the *Bank* under it, and that the Plaintiff could not sustain this as a bill on behalf of himself and all other members of the *Corporation*, or at all events, could not sustain it without making all or some of those parties who had assented to the arrangement parties to the suit. But the contract was one between the two companies, and if the contract was *ultrà vires* the *Corporation*, it is a contract which, in the eye of this Court, it is for the benefit of all the shareholders in the *Corporation* to arrest; and, in my opinion, a proper form of suit in which to accomplish this end is a suit by one member of the company on behalf of himself and all other members making the directors of the *Corporation* and the other contracting company parties as Defendants.

The Appellant further argued that this suit was open to exception on the score of delay. The deed between the companies was executed on the 17th of May, 1865. The Plaintiff stated his

objections to his own company early in June, 1865. Some correspondence took place between this date and the month of November as to the terms on which he might be relieved from liability, and on the 10th of November, 1865, he filed his bill. So far, therefore, as his own company was concerned they were aware from a very early period that he not only dissented from, but challenged the validity of the arrangement. In addition, however, to this it is to be observed that this is not a case of delay in asserting an equity, or in taking steps to avoid a contract into which the Plaintiff has *de facto* entered. The Plaintiff was, and continued throughout to be, the owner of his shares in the *Corporation*, and of all rights incident to those shares, unless the rights were taken away, or effectively bound by the arrangement for amalgamation, and he was simply asserting and maintaining those rights. Those rights, in my opinion, have not been taken away, and I think he is not disentitled to relief and protection on account of any delay. [His Lordship then expressed his opinion that the decree ought to be varied by omitting a part which declared that, without prejudice to any question between the shareholders and the creditors, the shareholders were entitled to have their shares returned (1).]

SIR W. P. WOOD, L.J.:—

I have very little to add after the clear exposition which the Lord Chancellor has given of the grounds upon which the decree may be supported. I can only now say that I have not seen any reason to change the view which I entertained at the time of the original hearing. As regards the reasons which have been assigned, the case has now had the advantage of having the foundation of that decision rested upon grounds more clearly expounded than in that judgment which I then gave or any which I could now give. I acquiesce entirely in the proposed alteration in what may be termed a subsidiary portion of the decree.

SIR C. J. SELWYN, L.J.:—

It has not been contended that the arrangement in question in this suit can be supported under the articles of association of the

(1) See Law Rep. 5 Eq. 480.

L. C. and L. JJ.

1868

CLINCH v. FINANCIAL CORPORATION.

Financial Corporation, and it was distinctly stated by Sir *Roundell Palmer* that if good, it is good under the 161st section of the Act of 1862. The words of that section are doubtless very wide and comprehensive, but it contains no power to impose any new or additional liability upon the shareholders of the selling company, and provides only for the payment of the purchase-money of the shares of dissentient shareholders, which is directed to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution. It was also virtually admitted that if the construction of the documents in question adopted by the Court below was correct, the arrangement which was carried into effect by those documents was not one falling within the scope of the 161st section, and in particular that if the Vice-Chancellor was right in supposing that the calls were to be made upon all the shareholders, the arrangement must be considered to be *ultrà vires*. The substantial question, therefore, is one, as the Lord Chancellor has already said, upon the construction of these documents. [His Lordship then commented on the documents, and came to the conclusion that they contemplated a call upon all the shareholders.]

It was further argued, that as the arrangement which was made imposes upon the *Bank* immediately and unconditionally the discharge of certain onerous duties and obligations, and as the *Bank* had in fact discharged those onerous duties and obligations, it would now be unjust to set aside that arrangement. But upon the question of construction, it is material to observe that no provision whatever was made in the deeds for the release of the *Bank* from their obligation in the event of a large proportion of the shareholders refusing to accede to the arrangement. And this leads me to the further observation that throughout all the documents and resolutions no trace is to be found of any such provisions as would have been necessary for the protection of the parties if the arrangement contemplated had been of such a partial and conditional character as is contended for by the Appellants. There is no resolution or provision for the payment of the purchase-money for the interest of any dissentient shareholders.

The consideration, therefore, of that which is contained in these

documents, as well as the absence of any such provisions as those to which I have alluded, lead, in my judgment, irresistibly to the same conclusion as that at which the Court below has arrived. I think, therefore, although it may be expedient to alter the decree by the omission of that clause to which the Lord Chancellor has referred, that the appeal substantially fails and must be dismissed with costs.

Solicitors for the Bank: Messrs. *Uptons, Johnson, & Upton.*
Solicitors for the Plaintiff: Messrs. *Nelson & Goodman.*
Solicitors for the other Defendants, Messrs. *Flux, Argles, & Rawlins:* Messrs. *Young, Maples, & Co.;* Messrs. *Thomas & Hollams;* Messrs. *Cox & Sons.*

Ex parte EGYPTIAN COMMERCIAL AND TRADING COMPANY. *In re* KELSON.

Inspectorship Deed—Bankruptcy Act, 1861, *ss.* 192, 197—*Execution against Property of the Partners members of another Firm—Time at which Amount of Debt is to be ascertained—Registration.*

A firm in *England* accepted bills drawn by a firm in *Egypt* which consisted of the members of the English firm and two other persons. Afterwards the English firm executed an inspectorship deed, which was duly registered under the *Bankruptcy Act*, 1861. The deed contained no assignment of the assets of the firm, but provided that the partners should get in all their joint and separate estates under inspection, and that the proceeds should be distributed by the inspectors in like manner as under an adjudication of bankruptcy of the same date as the deed. It was also provided that every creditor should, if required, make a statement of his debt and of any satisfaction or security for the same; and also that no creditor who had obtained execution against any part of the estate of the debtors, or any, or one of them, should be allowed the benefit of the execution and of the deed without bringing the amount received into general division.

In the interval between the execution and registration of the deed the holders of some of the bills, amounting to £10,000, obtained an execution against the Egyptian firm, as drawers, in an action on one of the bills in the Consular Court, and recovered £3000. For some time after the registration of the deed the holders of the bills refused to come in under the deed, and made no claim; but eventually they claimed a dividend on the whole debt of £10,000. The inspectors resisted the demand on the grounds:—1. That the creditors ought to elect either to give up their claim or else bring in the proceeds of

L. C.
1868
Ex parte EGYPTIAN COMMERCIAL AND TRADING COMPANY.
In re KELSON.

their execution. 2. That if any claim was admitted they ought to deduct the £3000 which they had recovered from the drawers:—

Held, first, that as there was no bankruptcy of the English firm, and the deed contained no assignment of the estate of the partners, the deed did not affect the joint estate of the Egyptian firm, and that consequently the holders of the bills were entitled to prove under the deed without giving up the benefit of their execution.

Dutton v. *Morrison* (1) distinguished.

Secondly: That the question whether the creditors had received satisfaction of any part of their debt must be determined with reference to the time when they made their claim, and not with reference to the date of the execution of the deed; and, consequently, that the sum recovered from the drawers must be deducted from their claim.

6 Ch 450-9, 460
550,
8 Ch 741-5,
9 Ch 558

THERE were two appeals in this case from a decision of Mr. Commissioner *Holroyd*.

The *Egyptian Commercial and Trading Company* were the holders of bills of exchange to the amount of £10,130 2*s*. 10*d*. drawn by a firm of *Kelson, Hankey, & Co*, trading at *Alexandria*, upon, and accepted by, a firm of *Kelson, Tritton & Co*., trading in *London*. The *London* firm of *Kelson, Tritton, & Co*. consisted of five partners; the *Alexandria* firm of *Kelson, Hankey, & Co*. consisted of seven partners—namely, the five partners in the *London* firm and two other persons.

On the 30th of June, 1865, *Kelson, Tritton & Co*., executed an inspectorship deed of that date, which was duly registered on the the 20th of July following.

The deed was made between the members of the firm, the inspectors, and the creditors, the latter of whom were described "as the several persons, companies, and co-partnership firms, who at the date hereof are respectively creditors of the said debtors, or any of them, or who would be entitled to prove under an adjudication of bankruptcy against the said debtors, founded on a petition filed on the day of the date of these presents." It contained no assignment of the assets to the inspectors, but provided that the debtors should wind up the business and get in their joint and separate estates in *Great Britain*, or elsewhere, under inspection, and pay the proceeds to the inspectors to be divided by them among the creditors in accordance with the bankrupt laws as if the partners had been adjudicated bankrupt on the day of the date of the deed.

(1) 17 Ves. 193.

The clauses specially referred to in the argument were the following :—

Clause 1. "That the joint and separate estates of the said debtors shall be administered in accordance with the principles of the present bankrupt law in *England*, or as near thereto as circumstances will permit, having regard to the terms of these presents."

Clause 8. "That until full payment and satisfaction, as hereinafter mentioned, all the moneys and proceeds to arise from the said estate and effects shall be applied in like manner as under a joint administration in bankruptcy against the said debtors; First, in paying all costs, charges, and expenses. Secondly, in paying any sum or sums by these presents authorized to be paid, and any rent or other moneys for or in respect of which any part of the said joint and separate estates could be distrained or detained. And thirdly, in paying such dividends upon the general debts, claims, or demands of the said creditors respectively, as would have been and become payable out of such parts of the funds and property constituting the said joint and separate estates respectively, as would have been applicable thereto under the statutes in force relating to bankruptcy, and the rules and practice of the Court of Bankruptcy in *England*, in case the debtors had on the date of these presents been jointly adjudged bankrupts, until full payment thereof respectively, and of all interest which would have become payable therein respectively under such adjudication."

Clause 12. "That each of the creditors, before becoming entitled to receive any dividend, shall be required by the inspectors, or the survivor of them, to deliver to them or him, or to such person as they or he should appoint, a statement in writing on the part of the creditors respectively of their or his debt or claim, or of the debt or claim of the company or partnership in which he or they may be a partner or manager, with all the particulars necessary or usual on a proof in bankruptcy, comprising every satisfaction and security for the same, or any part thereof."

Clause 15. "That for the purposes of the dividend payable under these presents, the securities held by any of the said creditors shall be reckoned and taken into account at a value to be assessed by and between such creditor and the inspectors: Provided that no creditor attaching or taking in execution, or who may have

L. C. 1868 *Ex parte* Egyptian Commercial and Trading Company. *In re* Kelson.

attached or taken in execution, any part of the estate of the debtors, or any or one of them, shall be allowed the benefit of such attachment or execution, and of these presents, without bringing such attachment or execution, or the proceeds thereof, into general division, except so far as any such attachment or execution, or the levy or security made or obtained therefrom or thereunder, would have been available under the *Bankruptcy Act*, 1861."

In the list of creditors made out by the debtors shortly after the execution of the deed, the *Egyptian Trading Company* were inserted as creditors to the full amount of the acceptances; but between the date of the deed and the registration, namely, on the 14th of July, 1865, the *Egyptian Trading Company*, having sued *Kelson, Hankey, & Co.*, the drawers of the bills, in the Consular Court of *Alexandria* upon one of the bills for £4000, obtained payment of £3000 17*s.* 6*d.*, by execution levied on their goods in *Egypt*.

The *Egyptian Trading Company* refused to assent to the deed, and for some time after the registration they declined to make any claim against the estate of *Kelson, Tritton, & Co.* in respect of their debt. On the 23rd of September, 1865, their solicitors, in answer to an application from the inspectors, wrote a letter saying that in the present position of affairs they could not advise the company to consent, or come in under the deed. The inspectors consequently paid a dividend of 4*s.* in the pound to the other creditors, without setting apart any fund to answer any future claim of the *Egyptian Trading Company*. However, towards the close of the year 1867, the *Egyptian Trading Company* sent in a claim for the whole amount of £10,130 2*s.* 10*d.*, which was resisted by the inspectors. The matter was brought before the Commissioner, who held that the company were entitled to prove only for the balance, after deducting the sum of £3000 17*s.* 6*d.* recovered by them from the drawers; and the company appealed from this decision.

The appeal came on to be heard before Lord *Cairns* when Lord Justice, but after the appeal had been opened the case was ordered to stand over, to enable the Respondents to bring a cross-appeal on the ground that the Commissioner ought to have rejected the proof altogether, unless the *Egyptian Trading Company* would

bring the amount recovered by them from the Egyptian firm into hotchpot; His Lordship being of opinion that that contention could not be raised on the original appeal.

The two appeals now came on to be heard before His Lordship as Lord Chancellor.

Mr. *Druce*, Q.C., and Mr. *Montague Cookson*, for the *Egyptian Trading Company*, the Appellants in the original appeal:—

The date of the deed corresponds to the date of an adjudication in bankruptcy. This is clear from the deed itself, where the creditors are defined as such as would have been entitled to prove under a bankruptcy founded on a petition of the same date as the deed. The whole scheme of the deed, particularly the 1st, 8th, and 12th clauses support the same view. The 197th section of the *Bankruptcy Act*, 1861, is consistent with this: for it enacts that from and after the registration of the deed the jurisdiction and laws of bankruptcy are to be applicable "in the same or in like manner as if the debtor had been adjudicated a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy." All this, including the proof of debts, therefore, is supposed to have taken place before the registration. If this had been a bankruptcy, and we had proved against the estate immediately after the adjudication, before the money had been recovered from the drawers, we should have been allowed to keep our proof for the whole debt. There is no formal proof by creditors under a trust deed; what answers to the proof is the preparation of the list of creditors by the debtor, and this ought to be done at the time of the execution of the deed. If the debts were to be ascertained at any other time it would enable the debtor and the trustees to baffle a creditor who might be enforcing his remedy against a surety by delaying to admit his claim.

With respect to the claim of the inspectors in the cross-appeal, to put the company to their election either to withdraw their claim or to bring the proceeds of the execution into general division, we contend that the Commissioner was right in holding that the doctrine of election does not apply here. The proceedings at law were against a distinct firm. The deed contained no assign-

L. C. 1868

Ex parte Egyptian Commercial and Trading Company. *In re* Kelson.

ment of the interest of the partners in the Egyptian firm, and did not have the effect of dissolving that partnership: *In re Stanborough* (1); *Brickwood* v. *Miller* (2).

Mr. *De Gex*, Q.C., and Mr. *Wickens*, for the inspectors of *Kelson, Tritton, & Co.*:—

With respect to the original appeal, the time corresponding to the adjudication of bankruptcy, or at all events to the proof, is the registration of the deed: *Stanger* v. *Miller* (3); *Ex parte Sullivan* (4); *Ex parte Petrie* (5). The present claimants for some time after the date of the deed were contesting its validity, and declining to come in under it, and they cannot now say that at this very time they must be treated as having proved under it.

As to the cross-appeal, the circumstance of the Egyptian firm comprising other persons besides the insolvent debtors, does not exclude the rule that a creditor must elect between legal proceedings and proof under what is equivalent to a bankruptcy: *Dutton* v. *Morrison* (6). In the present case, the deed was certainly intended to include, and does include, the interest of the debtors in the Egyptian firm, and although there was no actual assignment of it, that was immaterial, the only difference between assignment and inspectorship being, that in the latter case the debtors themselves are the trustees. The fact of the proceedings having taken place in what, for some purposes, may be considered as a foreign Court, and against foreign assets, does not affect the question of election: *Selkrig* v. *Davies* (7).

Mr. *M. Cookson*, in reply.

June 3. Lord Cairns, L.C., after shortly stating the facts, continued:—

I will take first the proposition raised upon what has been called the cross appeal. The case was argued as if the deed of the 30th

(1) 5 Madd. 89.
(2) 3 Mer. 279.
(3) Law Rep. 1 Ex. 58.
(4) 36 L. J. (Bkcy.) 1.
(5) Law Rep. 3 Ch. 232.
(6) 17 Ves. 193.
(7) 2 Dow. 230.

of June, 1865, was equivalent to the bankruptcy of the *London* firm, or, at all events, contained an assignment of the property of the *London* firm. But the deed has no such effect. The deed no doubt refers to a hypothetical bankruptcy as at the date of the deed, for the purpose of determining how the assets of the *London* firm are to be distributed; but there is no assignment of any kind by the *London* firm of their assets, and therefore, as regards the *status* of the five *London* partners in the Egyptian firm, there is nothing in this deed which severs the connection of those five partners from the Egyptian firm, or which severs what otherwise would be the joint partnership property of the Egyptian firm into divided portions. In fact, there is nothing whatever in the deed which prevented the Egyptian firm, after the date of it, from going on in business, and disposing of the joint assets of that firm in the proper course of business. Therefore it appears to me,—the existence of the double right against the Egyptian firm as drawers, and the *London* firm as acceptors, being admitted,—there was nothing whatever to prevent the Egyptian firm after the 30th of June, 1865, if they had been so minded, from paying the holders of the bills the whole or any part of their legitimate and proper demand against that firm as drawers of the bills. And I also think that the circumstance that the payment was not made voluntarily, but was recovered by process of law against the Egyptian firm as drawers, can make no difference, and that the holders of the bills are perfectly entitled to retain any money they have so recovered. This makes the distinction between the present case and the case of *Dutton* v. *Morrison* (1), in which there was a bankruptcy, and the assignees of the bankrupt firm sought to restrain the attachment against one of the partners trading in another business.

That, therefore, disposes of the cross appeal, unless there is something in the deed making it a condition of proof that anything recovered by means of execution should be brought into hotchpot. The only clause which has the slightest bearing upon this point is the 15th, the latter part of which provides that the condition of obtaining any benefit by the present deed is that the creditor must bring into general division "the attachment or execution against any part of the estate of the debtors, or any or

(1) 17 Ves. 193.

L. C. 1868

Ex parte Egyptian Commercial and Trading Company. *In re* Kelson.

one of them." The debtors in this deed were the five *London* partners; therefore, anything which is obtained by attachment or process of law, against the estate of any or one of them, must be brought into division; but the property of the Egyptian firm was not the joint estate of the firm, or the separate estate of any one of them. It does not, therefore, come within the meaning of the words which I have read.

I now come to the question raised by the original appeal. Upon that question it appears to me that the Commissioner is perfectly right. The deed contains this provision in the 12th clause:—[His Lordship read the clause set out above, and proceeded:—] This provision commences no doubt with the words "if required," but, in fact, in the present case, there is no admission by the inspectors at any moment anterior to the proceedings before the Commissioner, of any certain specified debt being due to the *Egyptian Trading Company*. The *Egyptian Trading Company* came, in substance, before the Commissioner to establish the amount of debt in respect of which they were to be treated as creditors, and it is upon that application that the inspectors challenge their right to stand as creditors for the whole amount, and claim to have it investigated and shewn what satisfaction they have received for any part of it. They, therefore, under the clause, are bound to exhibit, upon offering to prove and to be admitted creditors, every satisfaction they have received of any part of their debt. In fact, they have received £3000 17*s.* 6*d.* It appears to me as clear as anything can be, that they are bound to take that off from the total amount for which they claim to be admitted as creditors, and that the Commissioner's order in that respect is perfectly right.

I think, therefore, that both appeals fail, and that both appeals must be dismissed with costs.

Solicitors: Mr. *G. M. Clements*; Messrs. *Mackenzie, Trinder & Co.*

L. C.
1868
July 27, 29.

GAYFORD *v.* MOFFATT.

Prescription—Easement—Landlord and Tenant—Way of Necessity.

The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made over an outer close which belongs to the same landlord.

But the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord.

Decree of *Stuart*, V.C., reversed.

36 Ch D. 815
13 LR D 804
866
17 Ch D 39
20 Ch D 776
22 Ch D 180

By an indenture of lease, dated the 21st of March, 1835, *S. D. Ellam*, who was the tenant for a term of years of the vaults demised, and also of the courtyard hereinafter mentioned, demised to *A. Black* a counting-house at No. 32, *Fenchurch Street*, and all the vaults and cellars under No. 32, and under the courtyard thereto, and also vaults under No. 31, together with all ways, paths, passages, rights, easements, drains, and appurtenances to the said rooms, vaults, and premises belonging, for the term of forty years from Christmas, 1834, at the yearly rent of £180. This lease, in 1854, became vested in the Plaintiff *Gayford*, who had been a partner with *Black* in the business of wine merchants in *Fenchurch Street*. There was an entrance to the vaults from the courtyard of No. 32, and *Black & Gayford* had always exercised a right of way across the courtyard both to the counting-house and also for conveying pipes of wine in waggons to the vault entrance in the courtyard, and they alleged that they had been in the habit of depositing packages in the rest of the yard, and had used the rest also for turning their waggons.

In the year 1864 the Defendant *Moffatt*, who was the owner of the fee simple, purchased *Ellam's* term and interest both in the vaults and in the courtyard, and in February, 1868, began to put up a building on part of the courtyard, which would curtail the space used by *Black & Gayford* for depositing their packages, and would, as they alleged, render it difficult, if not impossible, to bring waggons up to the vault entrance in the courtyard, and turn them so as to be able to use that entrance.

The Plaintiff thereupon filed his bill to restrain the Defendant

L. C. 1868 GAYFORD v. MOFFATT.

from continuing his building, or building at all on the courtyard. The Defendant admitted that the Plaintiff had a right of access to the vault entrance through the courtyard, but said that the proposed building would leave room for the waggons still to come up to the entrance, and turn; and the Defendant denied that the Plaintiff had been in the habit of depositing packages and pipes of wine on the rest of the courtyard, or that he had acquired any right so to do. On these points a great deal of evidence was entered into.

The Vice-Chancellor *Stuart* considered that the Plaintiff had a right to the use of the whole courtyard for his waggons, though not for deposit of packages, and that his enjoyment would be materially interfered with by the proposed building, and granted an injunction upon motion for a decree on the 6th of May, 1868.

The Defendant appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Davey*, for the Appellants.

Mr. *Bacon*, Q.C., and Mr. *Street*, for the Plaintiff, contended that the lessee had by user acquired a right to put casks in the yard, and had, both by grant and user, a right to have the whole yard in which to turn his waggons. As to the right of a lessee to prescribe against his landlord or against another lessee, they cited *Saunders* v. *Lord Annesley* (1); *Kavanagh* v. *Coal Mining Company of Ireland* (2); and *Daniel* v. *Anderson* (3).

LORD CAIRNS, L.C., said that the Vice-Chancellor had not allowed the Plaintiff's right to deposit packages in the yard, and His Lordship agreed in that view. The predecessor's lease contained no grant or demise of anything of that kind, and the evidence fell far short of shewing that there had been such a continuous practice of depositing packages as would give a good title even by an adverse user. His Lordship continued:—

But it is not necessary to examine the user, for this reason, that if there is a person to whom the owner of two closes has

(1) 2 Sch. & Lef. 73.
(2) 14 Ir. C. L. Rep. 82.
(3) 8 Jur. (N.S.) 328.

demised one of them, and if in order to get at that one there is a necessity to cross the other close which was not demised, and if in the course of years, from the circumstance that the landlord has no particular occasion to use the close for any other purposes, or that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant for his convenience occasionally to make deposits of this kind on other parts of the close, still it is utterly impossible that by such a course of proceeding the tenant, as against his landlord, could acquire any easement whatever. An easement must be acquired in respect of some tenement, and the only tenement in respect of which this easement could be acquired, and which itself would become the dominant tenement, is the demised close. But the possession of the tenant of the demised close is the possession of his landlord, and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close *A.* was the occupation of his landlord, could by that occupation acquire an easement over close *B.*, also belonging to his landlord—the duty of the tenant being to take care that if he is passing over close *B.* at all, he should do nothing on it more than his lease authorized him to do, and it must be supposed, for this part of the argument, that the lease in this case authorized him to do no more than cross the yard, without any right of depositing goods on it.

As to the general question of a grant of right of way, the termor, or the freeholder, of two closes has demised one of them to a tenant. The tenant cannot get at that close from a public highway, or street, without crossing the other close. The case therefore is exactly that described by Mr. Serjeant *Williams* in his note to the well-known case of *Pomfret* v. *Ricroft* (1): "So where a man having a close surrounded with his own land grants the close to another in fee, for life, or years, the grantee shall have a way to the close over the grantor's land as incident to the grant; for without it he cannot derive any benefit from the grant." "This principle seems to be the foundation of that species of way which is usually called a way of necessity."

Now, that is exactly the interpretation of the words used in this

(1) 1 Wms. Saund. 321, n. 6.

L. C. 1868 GAYFORD v. MOFFATT.

13 L.T.D. 804

grant, "with all ways to the premises appertaining;" it means, with such a way as the law would hold to be necessarily appertaining to premises such as these—that is, a way of necessity; therefore, immediately after this lease was granted, this tenant occupying the inner close became entitled to a way of necessity through the outer close, and that way must be a way suitable to the business to be carried on on the premises demised, namely, the business of a wine and spirit merchant. That is the position in which the tenant stood after the lease was granted, and is the position in which he now stands.

The question is therefore reduced to this, whether there remained, after the building was erected, such a way as the Plaintiff would have been entitled to the day after the lease was granted. [His Lordship, after commenting on the evidence, came to the conclusion that room enough was left for the Plaintiff with his waggons to have access to the vault.] The Plaintiff's right of way was a right of necessity, and, upon the evidence, has not been interfered with by the Defendant. The case of the Plaintiff has wholly failed, and the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *W. W. & R. Wren.*
Solicitors for the Defendant: Messrs. *Willoughby & Cox.*

L. C. and L. J. S. 1868 *Dec.* 18, 19.

BELL *v.* BLYTH.

Ship—Mortgage—Entry of Discharge—Merchant Shipping Act, 17 & 18 *Vict c.* 104, *s.* 68.

14 L.T.D. 145

The owner of a ship mortgaged her to *G.* for £1200, and the mortgage was on the same day transferred to *B.*, and the mortgage and transfer were registered. In October, 1863, *G.* paid *B.* £1200, and *B.* signed a receipt indorsed on the mortgage that the £1200 was received "in discharge of the within-written security." The usual entry of discharge was made in the registry. After a year *B.* re-transferred to *G.* this mortgage, and the registrar wrote in the margin of the register that the receipt had been made by mistake, a re-transfer only being intended. *G.* then transferred the mortgage to the Appellants by way of security, which transfer was registered, and in March, 1865, the moneys advanced were paid off, but no re-transfer executed, and the mortgage remained in the Appellants' hands. In May, 1865, the

owner of the ship mortgaged her to *G.* by a deed registered on the following day, and this mortgage was transferred to the Plaintiff in November, 1865; but the transfer was not registered till July, 1866. In the meantime, in March, 1866, an agreement which never was registered was entered into between *G.* and the Appellants that *G.*'s original mortgage should be a security for the balance due from *G.* to the Appellants:—

Held (affirming the decision of the Master of the Rolls) that the Plaintiff's security had priority over that of the Appellants:

Held, that *G.*'s first mortgage was discharged by the entry of discharge, and could not be revived by the memorandum that the receipt had been given by mistake, and that the new bargain between *G.* and the Appellants in March, 1866, not being registered, was of no effect against the Plaintiff.

THIS was an appeal by the Defendants, *Blyth, Webb, & Co.* from a decree of the Master of the Rolls (1).

On the 23rd of April, 1862, *Routh* mortgaged a ship to *Grierson & Cole* for £1200. The mortgage was on the same day transferred to *Blyth*, and the mortgage and transfer were registered on the 25th of April, the mortgage being designated as mortgage *G.*

On the 21st of October, 1863, *Grierson & Cole* paid to *Blyth* £1200, and *Blyth's* father, under a power of attorney from *Blyth*, signed a receipt indorsed on the mortgage, "Received the sum of £1200 in discharge of the within-written security." On the 23rd of October the mortgage, with the receipt, was produced by *Blyth's* father, with the consent of *Grierson & Cole*, to the registrar, who entered the discharge of the mortgage in the usual way.

On the 20th of October, 1864, *Blyth* executed a re-transfer to *Grierson & Cole*, which was registered on the 22nd of October. Application was then made to the registrar to alter the entry of discharge, on the ground that the receipt was given by mistake; the intention having been to acknowledge the receipt of £1200 in discharge of the moneys due on the "above-written" security, *i.e.*, the transfer to *Blyth*. The registrar refused to amend the entry, but wrote against it in the margin that the receipt was signed in error, a re-transfer being intended.

On the 25th of October, 1864, mortgage *G.* was transferred by *Grierson & Cole* to *Webb*, who held it on behalf of the Appellants, and this transfer was registered on the 3rd of November 1864. In March, 1865, the moneys to secure which this transfer

(1) Law Rep. 6 Eq. 201.

L. C. and L. J. S. 1868 BELL v. BLYTH.

had been made were paid off by *Grierson & Cole*, but no re-transfer was executed, and the mortgage deed and transfer were left in the possession of the Appellants.

On the 19th of May, 1865, *Routh* executed a mortgage to *Grierson & Cole* to secure £2500, which was registered on the following day. This deed contained a covenant by *Routh* that the ship was free from incumbrances except as appeared by the register. The registry of this mortgage, which was designated mortgage *J.*, mentioned mortgage *G.* as a subsisting prior charge for £1200 in favour of *Webb*, but the £2500, in fact, included the £1200 for which mortgage *G.* was given to *Grierson & Cole*. On the 17th of November, 1865, *Grierson & Cole* transferred mortgage *J.* to the Plaintiff; but this transfer was not registered till July, 1866. In the meantime, on the 28th of March, 1866, an agreement was entered into between *Grierson & Cole* and the Appellants that mortgage *G.*, which was in the Appellants' hands as mentioned above, should be a security for the general balance due from *Grierson & Cole* to the Appellants.

The Master of the Rolls decided that the Plaintiff was entitled to the first charge on the ship.

Mr. *Druce*, Q.C., and Mr. *Robinson*, for the Appellants, referred to *Parr* v. *Applebee* (1).

Mr. *Jessel*, Q.C., and Mr. *Kekewich*, for the Plaintiff, referred to *Pease* v. *Jackson* (2); *Peel's Case* (3); *Hooper* v. *Gumm* (4).

Mr. *Hull*, and Mr. *Hadley*, for other parties.

Mr. *Druce*, in reply.

LORD HATHERLEY, L.C.:—

Neither of us has any doubt upon either of the points in this case—the discharge of the old mortgage, or the acquisition of a new title by what was intended to be a *quasi* revival of the old security.

As to the discharge, it seems to me that we should be contra-

(1) 7 D. M. & G. 585.
(2) Law Rep. 3 Ch. 576.
(3) Law Rep. 2 Ch. 674.
(4) Ibid. 282.

vening the provisions and policy of the Act if we were to say that when the discharge of a mortgage has been duly registered the mortgage can be revived on an allegation that the discharge was given by mistake. The Act expressly says (17 & 18 Vict. c. 104, s. 68): "Whenever any registered mortgage has been discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon duly signed and attested, make an entry in the register book to the effect that such mortgage has been discharged, and upon such entry being made the estate, if any, which passed to the mortgagee shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had ever been made." The first argument of the Appellants upon this was that the mortgage was not really discharged; that the entry of the discharge was a mistake, and that therefore the consequences which by the terms of the clause are made to depend upon the mortgage having been discharged do not follow. Now, such a reading of the clause would defeat the purpose of the Act. If a purchaser finding on the registry an entry that a mortgage has been discharged is subject to the possibility of its being held to be still a subsisting security, he will have to inquire into matters which he has no means of investigating, and ships will be rendered unsaleable.

What took place here was as follows:—*Grierson & Cole,* the owners of the original mortgage *G.* of the 23rd of April, 1862, transferred it to *Blyth,* who became the registered owner of it. It was afterwards produced to the registrar with a receipt indorsed, duly signed on behalf of *Blyth,* and expressing that it was discharged. It is contended that this was a mistake; that there was no intention to discharge *Routh;* and that the receipt ought to have expressed the money to have been received in discharge of the "above-written" security, meaning the transfer. But *Grierson & Cole* having taken a receipt in the very form which the Act requires, and having procured an entry of the discharge to be made in the register, I am of opinion that, under sect. 68, whatever may be the equities between them and *Routh,* the original mortgage is at an end.

As regards what afterwards took place, I am surprised that the

L. C. and L. J. S. 1868 BELL v. BLYTH.

registrar should allow a public document to be dealt with as was done here. Something was written in pencil at the side of the register, and this pencil writing afterwards, at what time does not appear, had these words written over it in ink: "Deed reproduced —receipt signed in error, when re-transfer intended, by *Philip Blyth.—E. S.*" An entry of this kind cannot, in my opinion, satisfy the Act, nor revive a mortgage which has been discharged. *Blyth*, however, professing to act upon the marginal note that a re-transfer was intended, enters, as the next entry upon the register: "No. 20. 22 Oct. 1864. Transfer of mortgage *G.*, dated 20 Oct. 1864." After this is registered a transfer of mortgage *G.* by *Grierson & Cole* to *Frederick Webb*. The money secured by this last transfer was paid off in March, 1865, before the Plaintiff took his security, but no re-transfer was executed.

The Plaintiff then takes his security at a time when *Grierson & Cole* were in a position to hand over to him the mortgage *G.*, supposing it to be subsisting. In November, 1865, the Plaintiff took from *Grierson & Cole* a transfer, which was not registered till July, 1866, of mortgage *J.*, being a mortgage of the same ship, executed by *Routh* on the 19th of May, 1865, and containing a covenant that the ship was free from incumbrances, "save as appears by the registry of the said ship." It is then urged against the Plaintiff that, whether the original transaction as to the entry of discharge of mortgage *G.* was right or not, no wrong is done to him by giving effect to it as against him, for that, as mortgage *G.* was entered on the register as a subsisting mortgage, he was informed that there was this security existing, and the purposes of the Act were answered. Suppose he has been so informed, the real facts being that it was not an existing security, that the old debt had been paid off, and that, after he had taken his security, a new bargain was entered into, by which the Appellants acquired a new security for a debt subsequently created, can this be held good under the *Merchant Shipping Act?* I apprehend that it cannot, but that the persons who took a fresh security were bound to register it as a new security, and could only in that way acquire a title which would affect the Plaintiff. Instead of this, though the old security had been paid off, the Appellants claim to stand upon it as against the Plaintiff, because

he did not register his security till after this new bargain had been made. I think that it is against the policy of the Act to allow a satisfied security to be revived in this way. It would be idle to contend that the mortgagor himself could have set up this satisfied mortgage as against an incumbrancer; can he then, by a subsequent bargain, enable a later incumbrancer to set it up, because the prior incumbrancer has been negligent in not registering his security? In my judgment, the policy of the Act is, that a true statement of the incumbrances should appear upon the register. Upon its legal construction, I am of opinion that the mortgage was dead and gone by the entry of satisfaction; but, if not, the Appellants still have no title, legal or equitable, against the Plaintiff, as the bargain under which they claim does not appear upon the register at all. The appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

On the 19th of May, 1865, the day of the date of the mortgage for £2500, the Appellants had not, nor had any of them, any beneficial interest in or charge upon the ship in question, and at that time the only persons having any beneficial interest in the ship were *Routh* the mortgagor, and *Grierson & Cole* the mortgagees under the deed, and they were competent to deal with it as they thought fit. They dealt with it by creating the mortgage for £2500, which was registered on the next day, the 20th of May, 1865, and that sum of £2500 included the prior mortgage debt of £1200, and this mortgage for £2500 was transferred to the Plaintiff on the 17th of November, 1865, at which time the Appellants were as destitute of any beneficial interest in, or charge upon, the ship, as they were on the 19th of May, 1865; and if the Plaintiff had made all possible inquiries, and had ascertained all the facts, he would have ascertained that the Appellants had no claim or estate. Independently, therefore, of any question under the Ship Registry Acts, the Appellants, whose claim arises for the first time under an agreement entered into on the 28th of March, 1866, are clearly subsequent in point of time, and have no case or ground for postponing the prior right of the Plaintiff. But it is argued on the part of the Appellants, that as the transfer of the £2500 to the

L. C. and L. J. S.
1868
BELL
v.
BLYTH.

Plaintiffs was not registered until the 12th of May, 1866, and after the agreement of the 28th of March, 1866, under which the Appellants claim, they, the Appellants, are entitled to set up the original mortgage for £1200, and are entitled to priority as from the date of the registration of that mortgage; but in my judgment such a claim is inconsistent not only with the letter, but also with the spirit and policy of the Ship Registry Acts. To allow such a claim would be to introduce the very difficulties, technicalities, and complications which it was the object of those Acts to exclude from transactions relating to the sale and mortgage of ships, and here the claim is made in a case in which the register itself, upon which alone the Appellants can rely, contains an entry made with the knowledge and consent of the authorized agent of the person entitled to the mortgage-money, in the ordinary form, and indorsed on the original mortgage, stating that the within-written security has been discharged, while no entry appears upon the register to shew that any new mortgage was created by *Routh;* for although the register does contain entries of a transfer of the mortgage for £1200 on the 20th of October, 1864, from *Blyth* to *Grierson & Cole,* and on the 25th of October, 1864, from *Grierson & Cole* to the Defendant *Frederick Philip Ripley Webb,* there is no entry on the register of the new contract of March, 1866, and it is admitted that, in fact, the sums intended to be secured by means of these transfers had all been paid off before the mortgage of the 19th of May,1865, was executed.

Solicitors: Messrs. *Cotterill & Sons*; Messrs. *W. & H. P. Sharp.*

NEWTON *v.* NEWTON.

L. C. and L. J. S.

1868

Nov. 21, 23; *Dec.* 19.

Equitable Mortgage by Trustee without Notice—Delivery up of Deeds—Purchaser for Value without Notice.

Where the Court establishes a prior equitable title to an estate as against a person who took an equitable mortgage by deposit of the title deeds from the legal owner without notice :—

Semble, it will go on to order him to deliver up the deeds, though he acquired them for value and without notice from the person who at law was the absolute owner of them.

Joyce v. *De Moleyns* (1) considered.

THIS was an appeal by the *London and Westminster Bank* from a decree of the Master of the Rolls (2).

The Plaintiffs, Mrs. *Newton* and her children, were *cestuis que trust* under a settlement of which *Robinson* was the surviving trustee. In 1860 *Robinson* advanced to *Newton*, the husband of Mrs. *Newton*, £2000 out of the trust funds to enable him to purchase an estate, and on the 7th of August, 1860, *Newton* mortgaged the estate to *Robinson* to secure the £2000. In May, 1861, *Robinson* deposited this mortgage deed with *Webster* by way of equitable mortgage to secure £1000 lent by *Webster* to *Robinson*.

In the same year *Robinson* advanced *Newton* £1100 to enable him to purchase another estate, and on the 25th of September, 1862, *Newton* mortgaged that estate to *Robinson* to secure the £1100. On the 8th of November, 1862, *Robinson* deposited this mortgage deed with the *London and Westminster Bank* to secure advances made to him by them.

The bill was filed to have the trust fund replaced, and to establish the title of the Plaintiffs as against *Webster* and the *London and Westminster Bank*. It was disputed whether the £1100 was trust money, but it was not alleged that *Webster* and the *London and Westminster Bank* had any notice of a trust when they took their securities.

The Master of the Rolls held it to be established by the evidence that the £1100, as well as the £2000, was trust money, and made

(1) 2 J. & Lat. 374. (2) Law Rep. 6 Eq. 135.

L. C. and L. J. S.

1868

NEWTON v. NEWTON.

a decree establishing the priority of the Plaintiffs over *Webster* and the bank, and ordering *Webster* and the bank to deliver up the deeds which had been deposited with them respectively.

Mr. *Jessel*, Q.C., and Mr. *Langworthy*, for the *London and Westminster Bank*, contended that on the evidence it was not shewn that the £1100 was not *Robinson's* own money, and that even if it was trust money, the Court would not order delivery up of a deed by a person who had taken it from the legal holder *bonâ fide* for value and without notice of a trust: *Wallwyn* v. *Lee* (1); *Re Foot* (2); *Manningford* v. *Toleman* (3); *Joyce* v. *De Moleyns* (4); *Fagg* v. *James* (5); *Thorndike* v. *Hunt* (6); *Allen* v. *Knight* (7); *Colyer* v. *Finch* (8); *Phillips* v. *Phillips* (9).

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the Plaintiffs, referred to *Dodds* v. *Hills* (10); *Baillie* v. *McKewan* (11); *Stackhouse* v. *Countess of Jersey* (12); *Benbow* v. *Townsend* (13); *Frazer* v. *Jones* (14); *Parker* v. *Whyte* (15); *Eyre* v. *Burmester* (16); *Ogilvie* v. *Jeaffreson* (17).

Mr. *Langworthy*, in reply.

Dec. 19. LORD HATHERLEY, L.C., delivered the judgment of the Court, and after stating the facts, and examining the evidence, upon which their Lordships considered that the Plaintiffs failed to shew that the £1100 secured by the mortgage of the 25th of September, 1862, was not *Robinson's* own money, continued:—

The conclusion at which we have arrived upon the facts of this case and the failure on the part of the Plaintiffs to establish the case alleged by them as against the Appellants, renders it unneces-

(1) 9 Ves. 24.
(2) 1 Gl. & J. 240.
(3) 1 Coll. 670.
(4) 2 J. & Lat. 374.
(5) 8 L. T. (N.S.) 5.
(6) 3 De G. & J. 563.
(7) 5 Hare, 272.
(8) 5 H. L. C. 905.
(9) 8 Jur. (N.S.) 145; 10 W. R. 236.
(10) 2 H. & M. 424.
(11) 35 Beav. 177.
(12) 1 J. & H. 721.
(13) 1 My. & K. 506.
(14) 5 Hare, 475.
(15) 1 H. & M. 167.
(16) 10 H. L. C. 90.
(17) 2 Giff. 353.

sary for us to decide the question of law which was raised on their behalf. It was argued on behalf of the Appellants that as the Defendant *Robinson* was the legal owner of the indenture of the 25th of September, 1862, and as that deed had been delivered to the Appellants as purchasers for value without notice of the Plaintiffs' rights, a Court of Equity ought not to interfere with the possession of the deed so acquired by them, and that the decree, even if it could be supported so far as related to the estate, was, at all events, erroneous in so far as it ordered the Appellants to deliver up the deed, and the cases of *Wallwyn* v. *Lee* (1), and *Joyce* v. *De Moleyns* (2) were referred to as authorities in support of that contention.

Although we have now decided the case upon another point, we think it right to observe that in *Wallywn* v. *Lee* the sole object of the suit was the recovery of the title deeds, and the Court there refused to give assistance against a purchaser for valuable consideration without notice, and Lord *Eldon* (3) referred to the principle that this Court will not stir against a purchaser for valuable consideration without notice.

There appears to us to be a material distinction between such a case as *Wallwyn* v. *Lee* and cases in which, either in consequence of the fund being in Court, as in *Stackhouse* v. *Countess of Jersey* (4), or in consequence of the legal estate being outstanding in a trustee, and the beneficial interest being claimed by several adverse but equally innocent purchasers for value without notice, the Court is called upon to declare, and does declare, the right to the fund or estate in question. In such cases the Court is necessarily called upon to make, and does make, a decree against some one or more of such purchasers for value, but as (in the language of Lord *St. Leonards* in *Smith* v. *Chichester* (5)), " it is clearly settled that the right to the estate confers the right to the possession of the title deeds," such a decree would be obviously incomplete in a material particular if, while declaring the Plaintiff to be absolutely entitled to the whole beneficial interest in the estate, it left the title deeds in the possession of one of the Defendants claiming

(1) 9 Ves. 24.
(2) 2 J. & Lat. 374.
(3) 9 Ves. 32.
(4) 1 J. & H. 721.
(5) 2 D. & War. 402.

L. C. and L. J. S. 1868 NEWTON v. NEWTON.

to hold them under an adverse title which the same decree declared to have no valid foundation. In *Joyce* v. *De Moleyns* (1), Lord *St. Leonards* expressly states that the very point which he was then called upon to decide in that case had been decided in *Wallwyn* v. *Lee* (2), and in the same judgment he mentions and recognises the case of *Smith* v. *Chichester* (3), to which we have already referred.

These authorities have been reviewed by the Master of the Rolls in the present case, and as His Lordship found that the legal estate was still outstanding in the trustee *Robinson,* and as His Lordship decided that upon his view of the evidence the Plaintiffs were entitled to a declaration confirming their equitable title to the estate, he has also by the decree ordered the Appellants to deliver up the mortgage deed and the other documents of title relating to the premises therein comprised. Although we have arrived at a different conclusion upon the evidence in this case, we wish to be understood as not entertaining any opinion adverse to that expressed by the Master of the Rolls upon this question of law.

The appeal must, we think, be allowed, and the bill dismissed with costs as against the Appellants. There will be no costs of the appeal. The deposit will be returned.

Solicitors: Mr. *R. H. Pearpoint;* Messrs. *Roy & Cartwright.*

L. C. and L. J. S. 1868 *Dec.* 21, 22.

ATTORNEY-GENERAL *v.* COLNEY HATCH LUNATIC ASYLUM.

*Injunction—Nuisance—Form of Decree—Reference to Expert—*15 & 16 *Vict. c.* 80, *s.* 42*—Suspension of Injunction in difficult Cases—Nuisance committed by a Public Body—Information at the Relation of Local Board of Health.*

Where a Plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the Defendant can best remove it. The Plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the Defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to.

In such a case a reference before the decree to an expert under the 15 & 16

(1) 2 J. & Lat. 374. (2) 9 Ves. 24.
(3) 2 D. & War. 402.

Vict. c. 80, s. 42, as to the existence of the injury, or as to the best mode of removing it, is improper.

Whether such a reference as to the best mode of removing the injury would be proper after the decree—*Quære.*

But when the difficulty of removing the injury is great, the Court will suspend the operation of the injunction for a time, with liberty to the Defendants to apply for an extension of time.

An information was filed at the relation of a Local Board of Health, praying for an injunction to restrain the visiting justices of a county lunatic asylum from allowing the sewage from the asylum to pollute a certain stream. The facts of the pollution of the stream existing, and being attributable in part to the sewage of the asylum, being proved, the Court granted an injunction; but suspended its operation for three months to enable the Defendants to make the necessary arrangements, with liberty to the Defendants to apply for an extension of time.

The decree of *Malins*, V.C., reversed.

If a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute.

It is no answer to an information at the relation of a Local Board of Health to abate a nuisance arising from sewage, that the Board has power itself to remedy the evil by making sewers; because it is the duty of the Board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works.

THIS information was filed at the relation of the Local Board of Health of *Edmonton*, in the name of their clerk, against the committee of visitors of the County Lunatic Asylum, at *Colney Hatch*, praying for an injunction to restrain the Defendants from causing or permitting any sewage or gas water to flow into a stream called *Pymm's Brook*, so as to be a nuisance injurious to public health.

The brook in question rises near *Finchley*, flows in an easterly direction, passing through the grounds of the lunatic asylum to the south of the building, and thence through the parish of *Tottenham* into the river *Lee*. When it enters the grounds of the asylum the brook is about ten feet wide, and about four inches deep in summer.

The asylum was erected in 1851 in pursuance of the provisions of the *Lunatic Asylums Act* (8 & 9 Vict. c. 126), which directed the magistrates of every county which had no adequate provision for lunatics, to build an asylum or to join with some neighbouring county in building one. The sewage and rain water from the building all flowed into the brook. Gas works had also been

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

erected in the grounds, but the nuisance arising from them was not insisted on in the argument.

Complaints were first made by the clerk of the Local Board of Health in September, 1852, and they were repeated from time to time until the filing of the information; and the Defendants had tried various schemes for abating the nuisance by deodorizing the sewage by chemical processes, and by filtering it, but without making any material improvement. At length, in October, 1865, the Relators filed this information, and shortly afterwards moved for an injunction in terms of the prayer, but the case was ordered to stand over, and the motion was turned into a motion for decree.

The evidence adduced by the Relators proved that the asylum contained upwards of 2200 inmates; that the drainage from the asylum amounted to 160,000 gallons daily; that the brook was sensibly polluted thereby, and from being a clear and wholesome stream had become filthy in appearance, unfit for the drink of men and cattle, and offensive and noxious to health from its effluvia. The Defendants substantially admitted the pollution of the stream, but they attributed it principally to the great number of new houses which had been built both above and below the grounds of the asylum, and which were all drained into the brook.

The cause came on for hearing before Vice-Chancellor *Malins* in the summer of 1867, but stood over in order to give the Defendants the opportunity of trying a scheme proposed by Mr. *Bazalgette*, an engineer, for deodorizing the sewage. That plan, however, failed, and the cause came on again in June, 1868, when the Vice-Chancellor gave the parties another opportunity of considering whether the nuisance could be remedied without the necessity of granting an injunction. As, however, no arrangement could be come to, His Honour eventually gave judgment on the 14th of July, 1868, whereby he directed a reference to Captain *Galton*, an eminent engineer officer, under the 42nd section of the 15 & 16 Vict. c. 80, and ordered the cause to stand over till he had made his report (1). The reference was in these terms:—

(1) The material part of the judgment of the Vice-Chancellor was as follows:—After stating the attempt which had been made to remedy the nuisance by Mr. *Bazalgette's* scheme, His Honour continued: I experienced a great disappointment, early in June, when Mr. *Cole* told me that the attempt had failed, and on his application the cause was restored to the paper.

"Whether it is necessary or proper, having regard to the health of the inhabitants of the district in which the County Lunatic

Having been restored, it was heard before me at great length on a part of the 23rd, the whole of the 24th, and a part of the 25th of that month. Being still pressed—and perhaps unduly, but still being pressed—with the impropriety and with the difficulty of my giving an unqualified injunction, any obedience to which I did not see the means of finding, I again gave the parties an opportunity of considering what should be done, and I invited the parties, on the one hand, the magistrates, to call a special meeting, and on the other, the body represented by Mr. *Cole*, to do the same. It appeared, in a manner I have every reason to be satisfied with, that both bodies—as every body finds the Court of Chancery is always treated with the greatest possible respect by a public or a private body—have done all that I could expect them to do on such an occasion; but I am sorry to find that neither of them can point out to me what ought to be done. On one side it is urged that I ought to dismiss the information. I find there is far too much admitted by the magistrates of *Middlesex* to allow me to do that, as matters stand at present. On the other side it is urged that I should grant an injunction in the terms of the prayer of the information. If I were to accede to that, the difficulties I have pointed out would arise. There would be an injunction against the magistrates of *Middlesex*, which I am satisfied they would not know how to obey; and any steps they may take with the most earnest desire of satisfying the Court, and meeting the views of the Relators, would possibly result in this, that whatever step they might take, they would be told by their opponents afterwards that they had spent their money for no purpose, and ought to have done something quite different. This is, in truth, a ratepayers' question: both sides are public bodies, and are therefore anxious to avoid such a termination of the contest as that. Under these circumstances, seeing the concessions which have been made on both sides, and particularly having regard to the fact that most of the evidence before me was taken in 1866, and is now, I believe, at least two years old, and that it is impossible for me to know without further information what is the state of things now in 1868, or whether the magistrates may not have taken such steps as virtually to remove the nuisance; and considering that the Legislature has armed me with this power, "That it shall be lawful for the said Court, or any Judge thereof, in such way as they may think fit, to obtain assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable the Court or Judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate"—which always means to act or not to act as the Court shall think fit—I shall refer it to a scientific gentleman to report to me and to advise the Court what is the state of things now, and if there be a nuisance, what ought to be done to abate it. In doing so I am following the example of Lord Justice *Page Wood*, when he was Vice-Chancellor, in the case of the *Attorney-General* v. *Metropolitan Board of Works* (1 H. & M. 298), and of other Judges. I have, also, myself taken the same course in matters of this description, and I think it has been attended with great advantage to the suitors in many instances. (34 L.J. Ch. 215)

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

Asylum at *Colney Hatch*, in the county of *Middlesex*, is situated, that any and what steps should be taken for further purifying the sewage as it now flows from the said lunatic asylum into the stream called *Pymm's Brook*.

"Or whether it is necessary and proper that the same should be diverted from the said stream, and, if so, by what means such diversion can be effected."

From this order the Relators appealed.

Before the appeal was heard Captain *Galton* had inspected the locality, and had made his report, dated the 18th of November, 1868, which was read by the Court at the request of both parties.

After stating the experiments he had made as to the quantity of sewage matter contained in the stream at different places, Captain *Galton* stated the result as follows:—

"It is clear from this that the brook is considerably polluted with sewage before it receives the asylum sewage. The pollution is considerably increased by the asylum sewage, and still further by the sewage which is received from private houses immediately after it passes outside the asylum boundary; and it is quite certain that if the whole of the asylum sewage were removed from *Pymm's Brook*, that brook would still remain seriously polluted with sewage. It is also clear from this analysis that the method of treating the sewage with lime scarcely affects the sewage contamination, but that the process of irrigation purifies the sewage to a very material degree."

He then stated his opinion that the two plans of diverting the sewage from the brook by carrying it into the *Metropolitan High Level Sewer*, and by carrying it into the river *Lee*, were impracticable, and if practicable could not be carried out without an Act of Parliament; and, also, that a third plan, proposed by Mr. *Bazalgette*, for uniting the sewage of all the neighbouring districts, and carrying them to *Barking Creek*, although likely to prove effectual, could not at present be carried into effect by reason of the want of co-operation of many of the towns and parishes.

On the other hand, he found that the land belonging to the asylum, consisting of about 130 acres, of which 70 were on a lower level than the asylum, was well fitted for applying a system of

irrigation: and he concluded his report by certifying that, looking at the very complicated condition in which the question of the drainage of the *Lee* valley then stood, he could not see his way to any practical arrangements for diverting the sewage from *Pymm's Brook* which could be brought into speedy action; that, consequently, the sewage should be further purified; and that such purification would most certainly be effected by first removing from the sewage drains the rain-water which falls on the roofs of the asylum buildings, and then applying the whole of the sewage to the irrigation of the land.

Mr. *Cole*, Q.C., and Mr. *Macnaghten*, for the Appellants:—

The injunction ought to have been granted without any reference to Captain *Galton*. It is no part of the duty of the Attorney-General or of the Relators to shew how the mischief is to be remedied; it is sufficient if they prove that the nuisance exists, and that it is so important that an injunction is the only adequate remedy. Nor is it the duty of the Court to inquire how the Defendants can best abate the nuisance. The Defendants are bound to obey the injunction, and it is for them to find out the best way of doing so. We admit that the Court will not grant an injunction which is impossible to be executed; but this is no case of that kind, it is only a question of expense and inconvenience, which may be a reason for granting the Defendants time, but is none for refraining from declaring the right to an injunction: *Attorney-General* v. *Council of Borough of Birmingham* (1); *Attorney-General* v. *Proprietors of Bradford Canal* (2); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (3); *Attorney-General* v. *Heath* (before *Wood*, V.C., not reported); *Heath* v. *Wallingford* (before *Wood*, V.C., not reported); *Spokes* v. *Banbury Board of Health* (4).

The decree is erroneous in directing an inquiry to Captain *Galton* in the form in which this has been done. The Vice-Chancellor has not called him in to assist the Court on some special point, but has referred the whole matter at issue to him,—whether the Defendants had or had not caused a nuisance,—which the Court ought to have determined on the evidence, and which, indeed, was fully

(1) 4 K. & J. 528.
(2) Law Rep. 2 Eq. 71.
(3) Law Rep. 1 Ch. 349.
(4) Ibid. 1 Eq. 42.

L. C. and L. J. S. 1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM

established. Such a course is not within the intention of the Act: *Mildmay* v. *Lord Methuen* (1).

Sir *Roundell Palmer*, Q.C., Mr. *Schomberg*, Q.C., and Mr. *Renshaw*, for the Defendants:—

The Court had full power to make the reference to Captain *Galton*. The Vice-Chancellor has simply called in the aid of a scientific man to enable the Court to decide the question, and the motion for decree was directed to stand over till he had made his report. The report has been presented, and the cause might now be satisfactorily disposed of by the Vice-Chancellor. This appeal, therefore, is useless. The course taken by the Vice-Chancellor is peculiarly correct where, as in the present case, an interlocutory motion has been turned into a motion for decree, and where, consequently, the evidence is not so complete as in an ordinary case. In the present case, moreover, the length of time which has elapsed since the evidence was taken renders it necessary to have a fresh inquiry.

With respect to the right of the Relators to an injunction, we contend:—First: that the Defendants are not in the position of ordinary Defendants. They are the committee of visiting justices, acting under the powers of the *Lunatic Asylums Act* (8 & 9 Vict. c. 126) under which the asylum was built. The magistrates were obliged by the Act to build the asylum, and that obligation exonerates from all responsibility those who are exercising the powers of the Act. If private persons are injured, the Legislature is to blame, and they have no right to proceed against the visiting justices: *Plate Glass Company* v. *Meridith* (2); *Boulton* v. *Crowther* (3); *Rex* v. *Pease* (4); *Grocers' Company* v. *Donne* (5). At all events, the Court will not interfere by injunction in such a case: *Attorney-General* v. *Conservators of the Thames* (6); *Attorney-General* v. *Metropolitan Board of Works* (7). The present committee cannot be held responsible for what the magistrates did in 1851. Nor have they the power to abate the nuisance. They can neither remove the asylum nor make sewers. They have only

(1) 1 Drew. 216.
(2) 4 T. R. 794.
(3) 2 B. & C. 703.
(4) 4 B. & Ad. 30.
(5) 3 Bing. N. C. 34.
(6) 1 H. & M. 1.
(7) 1 H. & M. 298.

limited powers as visitors of the asylum. How, then, could they be punished for contempt of Court if they did not obey the injunction?

Secondly: we contend that, on the other hand, the Relators have the power, and it is their duty, themselves to remove the nuisance. They have powers to make sewers under the *Nuisances Removal Act*, 1855 (18 & 19 Vict. c. 121), s. 22, and the *Local Government Act*, 1858 (21 & 22 Vict. c. 98), ss. 30 and 31.

The present question is one which ought to have been the subject of an arrangement rather than of an information in Chancery. The Defendants were willing to assist in any scheme of sewerage, and to bear their share of expenses, but the Relators refused their offer. This is a question between two public bodies, and the Court has considerable latitude in such cases, because it must consider the inconvenience which would result to the public from its decision: *Rex* v. *Russell* (1).

We also rely upon the laches of the Relators. The nuisance has been going on ever since the asylum was built, and it is too late now to apply to this Court for an injunction.

LORD HATHERLEY, L.C.:—

Cases like the present, no doubt, shew the difficulty in which persons who are desirous of getting rid of refuse sewage are constantly placed, but it is a difficulty which must be met, not by applying to a Court of Law to escape from the exigencies of the condition in which they find themselves, but by an application to the Legislature.

Now, I believe the Court will always find that its simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and, having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide; leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no other mode of escape, to cease to do the acts which occasion the wrong.

(1) 6 B. & C. 566.

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

Now, I cannot help remarking that the learned Vice-Chancellor has misapplied two rules of the Court in saying, as he does in effect say, that he will not make any order in a case like the present without being satisfied that the order of the Court can in some manner or other be obeyed. No doubt there are cases where the Court will take care not to pronounce an idle and ineffectual order; for instance, the Court will not issue a mandatory injunction where it is impossible that the mandatory injunction can by any means be complied with. The simplest illustration of this is the case of cutting down timber. It would be idle when the trees have been cut down to make an order not to allow the trees to remain prostrate, and all that can be done in such a case is to leave the parties to their remedy for damages. Take another illustration. There might be a bank to prevent the influx of the sea, and that bank might be most improperly destroyed; the Court would restrain the performance of the act if it were in time to do so, but the act having been once done, and the sea admitted, the Court could only then leave the parties to their remedy for damages, considering it impossible to exclude the sea. But that has no application, as it seems to me, to a case like the present, where there is no impossibility in the persons who are committing a wrong ceasing to commit that wrong, though it may subject them, and I agree would subject them in this case, to very considerable inconvenience. They have inflicted this wrong on their neighbours for a considerable length of time, and having done so, they have a difficulty in at once ceasing to inflict it. That is a difficulty which is more properly met by the Court, as it has done in a variety of instances, allowing the Defendants sufficient time to set themselves right; but it affords no reason whatever for allowing them to continue to commit a wrong which would amount to permanent injury to the rights of their neighbours.

Now, I apply these observations to the subject matter before us. Here is a case in which I will assume, for the present purpose, that the Defendants are the persons who are committing the wrong. The asylum which is placed under the charge of the Defendants contains 2200 inhabitants, who, of course, create a vast amount of sewage, which somehow or other has to be dealt with. Now, it is said—and that is the difficulty in which the Vice-Chancellor has

thought himself to be placed—unless the Defendants are permitted to throw all this sewage upon their neighbours' lands, upon which they have no more right to throw it than into this Court, they cannot carry on the affairs of the asylum, and therefore they contend that they must be permitted to dispose of the whole of the sewage on their neighbours' lands. Surely, the mere statement of the proposition is quite sufficient to refute it. Nobody can suppose the law of *England* to be in that state. It is not to be supposed that because we are told, as I was told in the case of *Attorney-General* v. *Council of Borough of Birmingham* (1), that 300,000 people will be very much inconvenienced if they are not allowed to use their neighbours' property without paying for it; that on that account they are to be allowed to use their neighbours' property without paying for it. The answer to such a proposition is, you must apply to the Legislature to let you take the property—which the Legislature will certainly not let you do without paying for it—and when you have obtained that permission you may exercise your rights to purchase the property, and may do what you like with it. I must say it appears to me, with great deference to the view which the Vice-Chancellor has taken of the subject, that this Court has nothing to do with the propriety or impropriety of creating new rights on the part of the Legislature. This Court has merely to decide what is the law as it exists, and to see that it is duly administered; not to order anything to be done which is simply impossible, as in the illustration I have given, but to take care, subject to that modification, that persons shall be restrained from exercising with a high hand powers which they have no right in law to exercise.

I think this principle ought to be applied to the present case. The Attorney-General comes here to complain on the part of all the inhabitants of the neighbourhood, that a vast quantity of sewage is poured into a brook which in former times appears to have been pure. It is true that the contamination is partly caused by sewage from other houses, but the sewage poured into the brook from this asylum, containing 2200 inhabitants, greatly aggravates the evil. The nuisance is one which seems to me to be confessed. In this respect we have the satisfaction of agreeing with the learned Vice-

(1) 4 K. & J. 528.

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

Chancellor, who said that the Defendants had made far too many admissions for him to dismiss the bill. It would be enough for me to refer, if any doubt existed upon it, to the evidence of Mr. *Lawson*, who was sent to investigate the matter, and the report of the committee appointed by the magistrates. But we have also the extremely intelligible and sensible report of Captain *Galton*, which both sides agreed that we should read, and his testimony is exactly to the same effect. That being so, it would seem to me, I confess, that there was nothing to do when the cause came on for hearing but to give to the Informant, on behalf of the public, that remedy which is always accorded to those who have established their case, namely, a declaration of their right, and an injunction to restrain the wrong from being committed, unless it was that difficulty—which in truth was but an apparent difficulty—of enforcing the order of the Court. I put aside for the present the collateral points about the position of the magistrates, and also the question of delay, and I am taking it as if the nuisance had occurred a few weeks before the filing of the information. Then, surely, if that be so, it cannot be right or just that the Relators, after they have been waiting a considerable time for the hearing of the cause, should at the hearing, when everything has been said and proved that can be said and proved—when both the Relators and Defendants are agreed on the evil—it cannot be right that they should have no declaration of what that right is, and that the only order at the hearing of the cause should be a reference to Captain *Galton*. The first question referred to Captain *Galton* is: "Whether it is necessary and proper, having regard to the health of the inhabitants of the district in which the County Lunatic Asylum at *Colney Hatch* is situate, that any and what steps should be taken for further purifying the sewage." That is, surely, referring to this gentleman facts which have been proved in the cause. No one has had occasion to be more satisfied than I have been with the assistance which this gentleman's reports have given me; but it is not for him to decide, however much the Court may desire his evidence, as to what would be the proper course to be taken. The second question is: "Whether it is necessary or proper that the same should be diverted from the said stream; and if so, by what means such diversion can be effected." This, again, is open to the same obser-

vation. Of course, "it is necessary that the sewage should be diverted" if nothing else can be done to purify it. Such a reference to the engineer is of no use or value; and further than that, I think that no reference at any time ought to be made in a case where the answer to it can have no bearing on what the Court has to do. Suppose in this case Captain *Galton* had said: "I do not consider that any steps are necessary or proper," the Court would have had to look at the evidence, and in a case like this, where all parties agree in saying that there is a nuisance, and the only question is as to the way of getting rid of it, it would be the duty of the Court to proceed just as if no report had been made. There is also another objection, which goes more to the root of the inquiry, which is this:—I entertain a very strong opinion that when the nuisance is established all the Court has to do is to say that it must cease; and unless it should be plainly shewn that it was such a case as I have already described, where the ocean had broken in, and could not be carried back again, or such damage had occurred as to shew the proper remedy must be by an action for damages, and not by injunction, the Court is bound to grant the injunction, and it is no part of the duty either of those who make the complaint or of the Court to find out how that order can be best obeyed.

Now, in the present case the possibility of compliance is much clearer than it was in the case of *Attorney-General* v. *Council of Borough of Birmingham* (1). The nuisance is this, that daily these 2200 persons are adding their *quota* to this continuing evil. The answer is, of course, that you must not allow those 2200 persons thus to aggravate, day by day, the evil that exists. Is it impossible to prevent this? Were there not means of preventing such a nuisance before drainage was ever heard of? Formerly those who resided in the country had cesspools, and those were from time to time emptied, but nobody in the country ever thought of turning all the sewage of his house into his neighbour's garden. No doubt it is more difficult to provide this sort of accommodation for 2200 people than it is to provide it for twenty or thirty people, but the principle is exactly the same. Captain *Galton*, in his report, distinctly says that the difficulty may be met on

(1) 4 K. & J. 528.

L. C. and L. J. S.
1868
ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

the spot simply by using about thirty acres of land for depositing the sewage on it, whereas there are seventy acres now available for that purpose, which lie on an incline, and are suitable for such an arrangement. Or, again, it might be met in the way suggested by Lord Justice *Selwyn* in the course of the argument, by that which is now approved of by so many engineers, namely, the use of earth closets. It is unnecessary to pursue the subject further than that. To my mind it is made out clearly that there is no physical impossibility in restoring things to the state in which they were before the erection of the asylum. It is only a question of expense, and this Court is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong.

I have been considering this case as if it were the case of a single individual; but it has been urged by the counsel for the Defendants, with considerable force and ability, that this is the case not of an individual committing a wrong against another individual, but the case of a body of magistrates charged with a public duty, and who are performing that duty, I do not doubt, in an admirable way. On the other hand, also, the Informant represents the interests of a large district, which large district is subject to the rules and regulations of the Local Board of Health, and the Informant has for his Relators the Local Board of Health. It is said, therefore, that it is a case between two public bodies, and that being a case between two public bodies, it would have been far better that neither of them should have taken a step of this description, but that they should have taken counsel together to see how the difficulty could be best avoided.

On that last branch of the case I will not make a single observation. It is not the province of this Court to say how far parties would or would not act better by trying to settle their disputes between themselves before they come into Court. As they have not done so, all we have to do is to decide on the rights that exist between them. As regards the position of the Defendants, it is true that they act as a public body, wishing to discharge their duties in a proper manner. But that cannot give them any right to throw this sewage into their neighbours' property. Their Act of Parliament does not justify that. Mr. *Schomberg* cited

several cases, which shew that where a public body exercises the rights and privileges which Parliament has accorded to it, and in doing so injures individuals—if Parliament has not thought fit to say that those who may be injured by the exercise of these rights which have been created by the Legislature shall be compensated, such persons must not complain and cannot be compensated. He instanced the case of *Boulton* v. *Crowther* (1), where trustees were authorized by the Legislature to fill up a gap between two hills, and in doing so made an embankment in front of a gentleman's lodge in such a position that it was impossible to drive up to it. That was a strong case, and there may have been some oversight on the part of the Legislature; but the trustees could plead the authority of Parliament for doing that which they had done, and this gentleman had no right to compensation. But what is the clause in the Act of Parliament which tells me that these visiting magistrates building a house for the accommodation of lunatics, have also acquired the right to transfer the whole sewage and nuisance created by these lunatics into their neighbours' grounds? I find nothing of the kind, nothing that leads one to suppose for a moment that Parliament could have any such intention. Of course it cannot be deduced from the power given to erect a large building that as a necessary consequence all the refuse from the building is to be thrown on the neighbouring ground. I cannot, therefore, conceive how the fact of their being visiting magistrates can justify them in acting thus.

There was another point taken by Sir *Roundell Palmer*, who asked, "How can the visiting magistrates be made answerable now for that which was done by their predecessors fourteen or fifteen years ago, and how are they to redress the wrong then done?" The simple answer to this is, it is a continuing wrong; and, moreover, that as these unfortunate inmates are persons having no control over their own acts, and they and all the officers of the asylum are placed under the control of the visiting magistrates, the visiting magistrates must be responsible for their acts. There would be no nuisance if these persons did not daily commit it—there would be no nuisance if they were removed from the place, or if the deposits were turned into a cesspool on the property. It is

(1) 2 B. & C. 703.

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

in the power of the magistrates to correct that which is an evil, and they are, therefore, wrongdoers if it is allowed to be continuous.

Something was also said on the ground of delay. As regards delay, the case stands thus:—This course of proceeding, if not actually commenced, was sufficiently indicated in 1852, and thereupon the clerk to the Local Board of Health of *Edmonton* immediately called the attention of the magistrates to the evil, and from time to time attempts were made by the magistrates, most properly, by a variety of contrivances to remove it. They tried disinfecting fluid; they sent persons to *Stroud* to see what was done there; they dug a well 120 feet deep; they tried filtering-beds, and other things of that kind. This Court would be very loth to say that a public body should rush at once into a Chancery suit in dealing with another public body. Each of the bodies acts for a large section of ratepayers, and neither of them ought to be anxious to increase the rates by a useless litigation. Therefore it is impossible for the Court to say that persons are to be discouraged from entering into negotiations and arrangements at the peril of being told if all that is attempted to be done fails, they are too late in coming here, and the case is remediless. It appears to me the delay must count for nothing, and when the Relators filed this information in 1865 they were quite in time in filing it. Independently of that, I should have adhered to my decision in *Attorney-General* v. *Council of Borough of Birmingham* (1), and held that a lapse of thirteen or fourteen years would not be sufficient *per se* to justify the continuance of a nuisance which would amount to appropriating property by those who were not entitled to it, although it would of course have the effect of preventing an injunction being granted on an interlocutory application. Therefore, as far as delay is concerned, I cannot see anything to prevent the right of the Relators to seek for relief on that ground.

Another point raised by Sir *Roundell Palmer* and Mr. *Schomberg* was, that the Relators, who are the Local Board of Health, might do all they are calling on the Defendants to do. They allege that it was the duty of the Board of Health of *Edmonton* when they found a nuisance coming into the district, to prepare a sewer which would carry off and remove the nuisance. Beyond that, they

(1) 4 K. & J. 528.

had power, by a recent Act of Parliament, to communicate with the neighbouring Board of Health at *Tottenham*, and with the assistance of them also, to carry off the sewage through *Tottenham*, and so remove all that had been thus created. But in the first place, although it may be the duty of the Board of Health to remove every evil which cannot be otherwise removed, I apprehend it is no part of their duty to create expense in order to remove a nuisance imported wrongfully into their district, for which they have a much more easy and proper remedy, namely, the remedy of preventing the evil occurring. But, independently of that, the information here, although at the relation of this Board, is, in fact, not only on behalf of the inhabitants of their district, but on behalf of the inhabitants of all the districts affected by the evil. We have strong evidence on the part of the medical men what the evil is, and as to the disease it is likely to produce. Therefore, the Attorney-General would not be content with any proceeding which would deal with *Edmonton* alone, and let other persons affected by the nuisance continue still to be affected by it.

The only question that remains is, what is proper to be done in such a case. As regards authority, I should be reluctant to quote my own decisions, had they not been adopted by other branches of the Court, but the Master of the Rolls, in the case of *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1), which was not so strong a case as the present, adopted the same course, and his judgment was affirmed. In that case, there was strong evidence to shew that the intermediate space between the source of the alleged evil and the place affected, was not affected, and, therefore, that the Plaintiff might possibly be mistaken as to the cause of the grievance. But the Master of the Rolls took the course which I adopted in the case of *Attorney-General* v. *Heath*, and which appears to me to be the proper course to take here, namely, to grant an injunction to restrain the Defendants, their servants and agents, from allowing any sewage from the asylum to pass into this stream, or otherwise so as to be a nuisance, and then to suspend the injunction for a given time and to give liberty to apply.

Now I have to compare this course with that which has been

(1) Law Rep. 1 Eq. 161; 1 Ch. 349.

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

adopted by the Vice-Chancellor in this instance; considering that it is unusual to interfere with anything a Judge may think requisite to do in order to procure the proper and adequate information on which he shall ultimately act. He has directed this kind of intermediate inquiry to be made. I apprehend, however, that the view taken is not the proper view to take of a case like this, because, on the evidence before the Court, there was not a shadow of doubt that the nuisance had been established and, therefore, there was nothing more to be learnt on the subject. Nor was the inquiry necessary to guide the Court in framing its decision. It may be very valuable to the Defendants, as informing them what is the best mode of getting out of their difficulty, an inquiry with which the Court has nothing to do. However, my attention has been called to the case of *Heath* v. *Wallingford*, in which I did take the contrary course, but, as I now think, erroneously, and also in a subsequent case with reference to lights, *Yates* v. *Jack* (1), where I made an order very much like it in principle, directing an inquiry as to the modification of some building plans which had been laid before me; but the Lord Chancellor, Lord *Cranworth*, thought that was not the proper mode of dealing with the subject, and that the proper course was to restrain the Defendants from committing the injury which it had been proved they intended to commit, and that the Defendants must be left to relieve themselves as they best could. The onus thrown upon the Defendants, who have to comply with the terms of the injunction, is a necessary consequence of their own illegal act, and they must be prepared to satisfy the Court that they have complied with the terms of the injunction. In *Heath* v. *Wallingford*, I declared my opinion that a nuisance had been occasioned, and then I sent a reference to Chambers to know in what mode the sewage could be carried off, so as to prevent the nuisance, and I gave the parties liberty to apply. I am satisfied that in principle I was wrong, but I am still more satisfied that in practice I was wrong, because in practice it worked very ill. There were repeated steps taken at Chambers, great expense occasioned, and the parties were driven to compromise in a great measure by the terms in which I originally framed the order.

(1) Law Rep. 1 Ch. 295 12 Jur. N. S. 305

Therefore, I prefer to fall back upon that order which I pronounced in the case of the *Attorney-General* v. *Heath*, and to say the order should be as I have pronounced it, and to suspend the operation of the order, so as to give the parties plenty of time to take such steps as they may be advised in this matter. Having consulted on the subject, we think a reasonable time to fix would be the first day of Trinity Term, just before the hot weather comes on, but giving leave, as was done in the other cases, to the Defendants to apply, if they think fit, for an extension of that time, and we must now direct them to pay to the Relators the costs of this suit.

SIR C. J. SELWYN, L.J.:—

In this case the fact of the existence of a nuisance, and a nuisance of such a serious character as to call for the interference of this Court, has, in my judgment, been clearly established. It has been established by the evidence of the Relators' witnesses: it has been confirmed by the report made by the Defendants and their surveyor: it has been confirmed by the report of Captain *Galton*, to which we have been requested by both parties to refer, and it is also implied in the order made by the Vice-Chancellor himself. The burthen is therefore cast on the Defendants of shewing why the nuisance should not be dealt with by this Court according to its ordinary practice in such cases, and the defence is rested by Sir *Roundell Palmer* on three points:—first, upon the position and character of the Defendants; secondly, upon the ground of the delay which has occurred; and thirdly, upon the attempts which have been made by the justices, the Defendants, to remedy the evil complained of.

With respect to the first of these points, Sir *Roundell Palmer* says the justices are a body entrusted with the compulsory discharge of public duties, and they have no power, like the Defendants in the case of *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1), to do anything which would get rid of the nuisance complained of. On the other hand, it is plain, not only from the terms of the Act of Parliament to which he referred, but

(1) Law Rep. 1 Ch. 349.

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

also from the evidence in the case, that everything done in this asylum is done by agents and servants of the Defendants, and under their order and authority; and the Act of Parliament under which they act, although it has authorized them to maintain these pauper lunatics, has given them no authority to take or injure the property or rights of other persons. But if we were to listen to the argument, at all events to the extent to which it was carried by Mr. *Schomberg*, it would follow that these persons, having authority to establish one or more lunatic asylums, would have the right, acting under that authority, to take other persons' property in any manner they may think necessary for effecting their object, and they might stop an ancient light, or interfere with or divert public or private rights of way at their discretion. But the principle of law applicable to these cases has been very clearly and conclusively established by the opinion of the Judges, which was acted on by the House of Lords in a judgment delivered by Mr. Justice *Blackburn*, in the case of the *Mersey Docks Trustees* v. *Gibbs* (1). Mr. Justice *Blackburn*, in delivering the opinion of the Judges, said: "If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. If damage results from the doing of that thing, it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuriâ*, the remedy is to apply for compensation under the provisions of the statutes legalizing what would otherwise be a wrong." Then he proceeds: "But though the Legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done." Now that proposition obviously implies these two things—first, that the particular thing complained of must have been authorized by the Legislature; and secondly, that in doing that particular thing reasonable care must be taken that no unnecessary damage be done.

In the present case all that has been sanctioned by the Legislature is the erection of a lunatic asylum, or lunatic asylums; they may be made in any place; the patients may be so distributed in

(1) Law Rep. 1 H. L. 93, 112.

such manageable numbers as that no nuisance may be occasioned at all. Such sites may be chosen, and such ground taken, as to render it impossible that there shall be any nuisance to an adjoining proprietor. But an Act of Parliament merely authorizing the erection of such an asylum cannot justify an interference with the rights of neighbours to the extent contended for on the part of the Defendants, and as the Lord Chancellor has already pointed out in the case of this very asylum, assuming it to be continued as it is now, there are the means—and Captain *Galton* has pointed out the means—by which the nuisance now complained of may be remedied. Captain *Galton* says, "The asylum lands are 130 acres in extent, of which I am informed seventy acres are applicable to farm purposes. This latter portion is below the level of the asylum, and is so placed that over a great part of it the sewage could be disposed of by gravitation without the necessity of pumping." That plainly shews, that so far from this particular thing which is being done being authorized by the Legislature, the asylum contains in itself the means of remedying the nuisance.

But then it has been said that the Informant is to be precluded by the delay in the institution and prosecution of the suit. I think this second point, urged by Sir *Roundell Palmer*, is, in fact, conclusively answered by the third point of his argument, namely, that which related to the attempts which have been made by the justices to remedy the evil. For in a case of this kind, where we have on each side public officers acting in the exercise of a public duty, I think this Court ought not to look narrowly into the length of time which has been occupied by negotiations or attempts made in good faith on both sides in order, if possible, to remedy the evil.

Lastly, it is said that the attempts which have been made by the justices to remedy the evil, even if they do not render it right for the Court to dismiss this information, are sufficient to justify the inquiry the Vice-Chancellor has directed. But I think that objection is answered by the report of Captain *Galton*. It may not have been the fault, but certainly it has been the misfortune, of the justices that, although they made so many attempts, those attempts have all been made in a wrong direction, and have been unsuccessful, while they had within their own property and their own grounds, as now appears by the report of Captain *Galton*, the

L. C. and L. J. S.

1868

ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

means of remedying the evil. Although those attempts may be used by them as a ground for asking further time, they cannot be used to the extent of prejudicing the rights of the Informant to a decree for an injunction which involves a declaration of his right to put an end to the nuisance.

With respect to the reference which has been directed, if the inquiries were intended as meaning to leave it to Captain *Galton* to say whether the nuisance has been established or not, then I think it is open to the objection which the Lord Chancellor has pointed out, that that nuisance has been completely and clearly established by the evidence, and therefore that the Informant is entitled to a declaratory decree; but if the inquiry is only meant as to the means to be adopted to prevent or cure the evil, then it is a reference which might possibly be made after the decree. Then the question might arise whether the Defendants have been doing all that was possible in order to carry into execution the terms of the decree, or whether they ought to be allowed further time to do so. In neither of those cases would it be right to make such an inquiry preparatory to, or before, the decree. I think, therefore, the order, so far as relates to that inquiry, is certainly inconsistent with the practice of the Court.

The only remaining point that was raised is that which the Lord Chancellor has fully adverted to, and to which I will only add one word, namely, that the Relators are a body who have the power to make sewers, and that they themselves might have remedied the evil. That objection I also think is clearly answered in the report of Captain *Galton*. Two courses have been suggested: it is said they should have made a sewer, and connected it with the system of the General Metropolitan Sewage discharging itself into the river at *Barking*, and they might have made another system of sewers, carrying it in the direction of the river *Lee*. But then, as Captain *Galton* has pointed out, it is absolutely unlawful to divert any drainage whatever into the river *Lee*. As respects the alternative plan of carrying it into the metropolitan system, that system was made with reference to one particular area, and has been found, I fear, not more than sufficient for that area; and, as Captain *Galton* has shewn, that plan would be unlawful, and could not be done without the authority of some subsequent Act of Parliament.

L. C. and L. J. S.
1868
ATTORNEY-GENERAL v. COLNEY HATCH LUNATIC ASYLUM.

Although I have thought it right to say this, I entirely concur with what has fallen from the Lord Chancellor, that it does not lie in the mouths of the Defendants, who have created this nuisance, to say that the Relators and the Attorney-General are not entitled to a decree, because the Relators might have performed the duty which, in our judgment, is not cast on them at all. I think, therefore, the order must be discharged, and that the decree should be made in the form suggested by the Lord Chancellor.

Solicitor for the Relator: Mr. *Alfred Cox.*
Solicitors for the Defendants: Messrs. *C. & J. Allen & Sons.*

HERRING *v.* CLARK.

L. C. and L. J. S.
1868
Dec. 22.

Practice—Trustee Act, 1852, *s.* 1—*Lord Chancellor.*

Where the legal estate in land sold under the order of the Court is vested in a person of unsound mind, but not found lunatic, an order may be made by the Lord Chancellor on a Petition in Chancery, under the Trustee Acts, appointing a person to convey the legal estate so vested.

W.N. (79) 206
9 Ch. 374.
10 Ch. 274

IN this case a decree had been made by Vice-Chancellor *Stuart* for the dissolution of a partnership between the Plaintiff and the Defendant, and for the sale of the partnership property. The property had been sold, and the sale had been approved of and ordered to be carried into effect. Part of the property consisted of leaseholds, the legal estate in which was vested in the Plaintiff and the Defendant; and the Defendant being of unsound mind, but not found lunatic, was unable to concur in assigning the legal estate. The Plaintiff accordingly prepared a Petition entitled in the suit and in the Trustee Acts, praying that the Defendant might be declared a trustee within the meaning of the Act, and that a person might be appointed to concur with the Plaintiff in assigning the leaseholds for all the estate of the Defendant therein.

Doubts having been raised, having regard to the authorities (1),

(1) *Re Ormerod* (3 De G. & J. 249); *Barber* v. *Dawson* (6 N. R. 346); *Jeffryes* v. *Drysdale* (7 Jur. (N.S.) 667).

L. C. and L. J. S. 1868 HERRING v. CLARK.

whether this order could be made by a Vice-Chancellor under the *Trustee Extension Act*, 1852, sect. 1, or ought to be made both in Chancery and in Lunacy under the *Trustee Act*, 1850, sect. 3, the Petition was set down before the Lord Chancellor as an original Petition in Chancery.

Mr. *Higgins*, for the Petitioner.

Mr. *Barber*, and Mr. *Loughborough*, for the Respondents.

Their Lordships made the order in Chancery.

Solicitor: Mr. *T. Loughborough*.

L. C. and L. J. S. 1868 *Dec.* 18.

Ex parte ALSTON. *In re* HOLLAND.

Bankruptcy—Creditors' Deed—Marshalling Securities—Pledge of Bills of Lading by Consignees.

A firm in *Ceylon* employed a firm in *England* as their agents and factors, the course of business being that the *Ceylon* firm consigned cargoes to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with *T.*, their broker, to secure a large debt due from them to him. The English firm became insolvent and executed a creditors' deed under the *Bankruptcy Act*, 1861, and then *T.* sold the coffee (which produced more than sufficient to cover the bills drawn against it) and enough of the other securities to satisfy his debt:—

Held, that the *Ceylon* firm were entitled, as against the English firm in liquidation, to have the remaining securities in *T.*'s hands marshalled, and to have a lien thereon for the balance due to them upon the coffee transaction.

THIS was an appeal from a decision of Mr. Commissioner *Holroyd*, made in the winding up of the estate of *Holland, Thompson, & Co.*, under an inspectorship deed. The facts were brought before the Court in a special case, the statements of which were to the following effect:—

Holland, Thompson, & Co. were, in 1866, merchants carrying on

business in *London*. *Alston, Scott & Co.* were coffee planters at *Colombo* in *Ceylon* (par. 1, 2).

The said *Holland, Thompson & Co.* were the agents and factors in *England* of *Alston, Scott, & Co.*, and the course of business between the said firms was that *Alston, Scott & Co.* consigned cargoes of coffee and other merchandise to *Holland, Thompson, & Co.* for sale on account of *Alston, Scott, & Co.*, and drew bills of exchange on *Holland, Thompson, & Co.* against such consignments, and *Holland, Thompson, & Co.* accepted the said bills on the security of the said consignments, and applied the proceeds of the sale of the said consignments in taking up their said acceptances, and then remitted the balance, or accounted for the same, to *Alston, Scott, & Co.* (par. 3).

Previously to July, 1866, large consignments of coffee had been made by *Alston, Scott, & Co.* to *Holland, Thompson, & Co.*, and the latter firm had accepted bills against them. They had disposed of part of the coffee and placed the proceeds to the credit of *Alston, Scott, & Co.*, in the account between them (par. 4, 5).

Five of the bills of lading, respecting which the present question arose, were deposited by *Holland, Thompson, & Co.*, together with certain other securities, with a firm of brokers, *Trueman & Rowse*, as a security for the repayment of advances made by them to *Holland, Thompson, & Co.* *Alston, Scott, & Co.* had no interest whatever in the other securities, which had no connection with the dealings between the firm of *Alston, Scott, & Co.* and *Holland, Thompson, & Co.* (par. 6).

On the 26th of July, 1866, *Holland, Thompson, & Co.* stopped payment, and on the 17th of October the members of the firm executed an inspectorship deed, which was duly registered under the *Bankruptcy Act*, 1861 (par. 7).

At the time of the stoppage, the amount due from *Alston, Scott, & Co.* to *Holland, Thompson, & Co.* on account of the acceptances, was more than £5000; but this was afterwards reduced by the sale of coffee to £4182 5*s.* 8*d.* (par. 9, 10).

At the time of the stoppage the sum of £9062 19*s.* 2*d.* was due from *Holland, Thompson, & Co.* to *Trueman & Rowse* (par. 11).

After the stoppage *Trueman & Rowse* sold the coffee comprised

L. C. and L. J. S.
1868
Ex parte ALSTON.
In re HOLLAND.

in the five bills of lading for £6734 10*s.* 4*d.*, and applied the proceeds in payment of their debt, retaining a balance in their hands of £2328 8*s.* 10*d.* (par. 12).

The result of this was, that credit being given to *Alston, Scott, & Co.* for the sum of £6734 10*s.* 4*d.*, the produce of the coffee, in their account with *Holland, Thompson, & Co.*, a balance of £2552 4*s.* 8*d.* was due to *Alston, Scott & Co.* on account of the coffee (par. 13).

Trueman & Rowse then proceeded to sell some of their other securities, which realized £3470, and thereby they cleared off the bills of £2328 8*s.* 10*d.* due to them from *Holland, Thompson, & Co.*, leaving a balance of £1141 11*s.* 2*d.* in their hands (par. 14).

Some of the securities in the hands of *Trueman & Rowse* still remained unsold; and these securities, together with the balance of £1141 11*s.* 2*d.*, were now claimed by *Alston, Scott, & Co.* in liquidation of the balance of £2552 4*s.* 8*d.* (par. 15, 16).

These securities and balance were claimed on the other hand by the inspectors of *Holland, Thompson, & Co.* as part of their general estate, unaffected by any lien by *Alston, Scott, & Co.* The questions submitted to the Commissioner were, (1) whether *Alston, Scott, & Co.* were entitled to the sum of £1141 11*s.* 2*d.*, or whether the inspectors were so entitled; (2) whether *Alston, Scott, & Co.* were entitled to any lien on the securities left unsold, or whether they belonged to the estate of *Holland, Thompson, & Co.*; (3) how the costs were to be borne.

The Commissioner decided that the balance and securities belonged to the estate of *Holland, Thompson, & Co.*; and from this decision *Alston, Scott, & Co.* appealed.

Mr. *Marten*, for the Appellants:—

We contend that the Appellants are entitled to have the securities in *Trueman & Rowse's* hands marshalled in their favour. *Holland, Thompson, & Co.* were consignees of the Appellants' cargoes for sale, and it was contrary to the course of business between them that the consignees should pledge the coffee; at all events, as against the Appellants they had no authority to pledge it for their own debt. The result of what took place is, that *Trueman & Rowse* had two funds for the payment of the

debt due to them from *Holland, Thompson, & Co.*, namely, the coffee which belonged to the Appellants, subject to *Trueman & Rowse's* lien, and the securities belonging to *Holland, Thompson, & Co.;* and as they have paid themselves out of the coffee the Appellants are entitled to stand in their place and be paid out of the other securities. The case of *In re Westzinthus* (1), and *Broadbent* v. *Barlow* (2), are in point. The Commissioner considered the question concluded by the statement in the 13th paragraph of the special case; but he misunderstood the effect of that statement, which was merely an arithmetical calculation.

Mr. *Lindley*, for the Respondents:—

Before the Appellants can establish a case for marshalling they must shew, first, that the relationship between *Holland, Thompson, & Co.* and *Alston, Scott, & Co.* was such that *Alston, Scott, & Co.* were not only creditors, but that they had a specific lien on the coffee; and secondly, that they had that right at the time of the stoppage. We contend that *Holland, Thompson, & Co.* had a perfect right to deal with the coffee; they were debtors, not trustees. In the case of *In re Westzinthus* the Plaintiff had exercised his right of stoppage *in transitu*, and had given notice to the holders of the goods not to sell, claiming a lien thereon. There was no such claim or notice in the present case. In *Broadbent* v. *Barlow* a fraud was committed. In the present case, *Holland, Thompson, & Co.* acted in the ordinary way of business.

LORD HATHERLEY, L.C.:—

We think that our conclusion must be in favour of the Appellants on the facts which are stated in the special case.

The special case states that the course of business between the firms of *Alston, Scott, & Co.* and *Holland, Thompson, & Co.*, their agents and factors in *England*, was as follows: that *Alston, Scott, & Co.* consigned cargoes of coffee and other merchandize to *Holland, Thompson, & Co.* for sale on account of *Alston, Scott, & Co.*, and drew bills of exchange on *Holland, Thompson, & Co.* against such consignments, and they remitted the balance, or accounted for

(1) 5 B. & Ad. 817. (2) 3 D. F. & J. 570.

L. C. and L. J. S. 1868 *Ex parte* ALSTON. *In re* HOLLAND.

the same to *Alston, Scott, & Co.* Now, following that course of business, these goods were consigned on account of *Alston, Scott, & Co.*, and remained their goods; but they were placed in *Holland, Thompson, & Co.'s* hands for sale, *Holland, Thompson, & Co.'s* duty being to sell, and when they had sold the goods to pay themselves what was due to them, and remit the surplus to the consignors. But they could protect themselves against any undue amount of acceptance by refusing to accept the bills if they thought the goods sent for sale were not sufficient to satisfy their balance. That being their duty, I think that as between them and *Alston, Scott, & Co.*, it was inconsistent with that duty to pledge the goods to a third party, whereby they became subject to all the liabilities and claims on the part of the creditors, who might delay the sale of the goods, retaining them for the purpose of satisfying their own security. That being so, the case is exactly within *Broadbent* v. *Barlow* (1). *Trueman & Rowse* having goods in their hands on behalf of *Alston, Scott, & Co.*, and also other securities belonging to their debtors, *Holland, Thompson, & Co.*, either of which classes of securities they could enforce at their option, the actual owners of the goods, *Alston, Scott, & Co.*, are entitled to have them marshalled as against *Holland, Thompson, & Co.*, so that the equities may be worked out between the parties. That is the whole of the case. It does not appear to me that the question of notice arises in any way, because no notice is asserted as against *Trueman & Rowse*, whose right to dispose of the goods is not disputed; but as between *Alston, Scott, & Co.*, and *Holland, Thompson, & Co.*, the goods being in specie at the time of the insolvency, have fixed upon them the liability to the duty of *Holland, Thompson, & Co.* to sell for the benefit of *Alston, Scott, & Co.* They cannot prevent their being sold, but they may claim to ear-mark their property, so that when the goods are sold whatever remains is theirs. And as that balance has been applied in paying *Holland, Thompson, & Co.'s* debts, the other property, which was originally the property of *Holland, Thompson, & Co.*, must, to the extent of recouping what has been taken out of the property of *Alston, Scott, & Co.*, be handed over to *Alston, Scott, & Co.*

(1) 3 D. F. & J. 570.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. It is satisfactory to find that we do not differ upon any point of law from the learned Commissioner, but I think that he has drawn an erroneous conclusion upon the statement contained in the special case. It appears to me that *Alston, Scott, & Co.* do occupy the position which Mr. *Lindley* says is necessary in order to give to them the right of marshalling —or, indeed, a higher position—for it appears that they not only have a specific lien upon the fund, but they were in substance the owners of the coffee in question. The course of business, as described in the paragraph which the Lord Chancellor has read, was that the goods were sent for sale on account of *Alston, Scott, & Co.*, and they drew bills of exchange, not in respect of some general balance, but as against each consignment. Therefore upon each occasion the persons on whom these bills were drawn had the opportunity of judging whether the goods which were sent at the same time were of sufficient value to justify their acceptance of the bills. Of course, when they thought fit to accept the bills, the sum so advanced by them went into the general account; but until the goods were sold their duty remained, which is described in this paragraph of the special case—that is, to sell them on account of *Alston, Scott, & Co.* The statement in the 13th paragraph of the special case is nothing more than the statement of an arithmetical proposition as relating to taking certain accounts. It does not contain any statement by which the right of Messrs. *Alston, Scott, & Co.* could be prejudiced, although the learned Commissioner seems to have taken that view. I think therefore that there was nothing to shew that this right which previously existed in *Alston, Scott, & Co.* had been taken away by anything which happened after the stoppage. The appeal therefore must be allowed, and the special case must be answered in the words of the first alternative. The costs must come out of the surplus.

Solicitors for the Appellants: Messrs. *Waltons & Bubb.*
Solicitors for the Respondents: Messrs. *Ashurst, Morris, & Co.*

L. JJ.
1869
Jan. 11.

In re ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY.

CARRALLI & HAGGARD'S CLAIM.

Winding-up—Bankrupt Contributory—Mutual Credit—Set-off—Companies Act, 1862, *ss.* 75, 95—*Bankrupt Law Consolidation Act*, 1849, *s.* 171.

5 Ch. 493.

A contributory of a company in course of winding-up executed an inspectorship deed, the effect of which was to import the mutual credit clause of the Bankruptcy Act, 1849. At the date of the deed the contributory was the holder of three bills accepted by the company, which were shortly afterwards indorsed to an agent for collection. After the execution of the deed a call was made on the contributory to an amount exceeding that of the bills, and a few days later the bills matured:—

Held (reversing the decision of the Master of the Rolls), that the bills could not be proved against the company, but must be set off against the call.

THIS was an appeal by the official liquidator of the *Anglo-Greek Steam Navigation and Trading Company, Limited*, from a decision of the Master of the Rolls, admitting the claim of Messrs. *Carralli & Haggard* against the estate of the company for £1500.

Mr. *Michael Emmanuel Mavrogordato* acted as the insurance broker of the company, and on the 2nd of March, 1866, the company accepted three bills of exchange for £500 each, payable three months after date, which were drawn by him on the company in respect of some insurance premiums which he had paid on their behalf. On the 28th of May, 1866, an order was made for the winding up of the company. On the 1st of June, 1866, Mr. *Mavrogordato* executed an inspectorship deed for the benefit of his creditors, which was duly assented to and registered, and under which *Carralli & Haggard* were appointed inspectors. The form of the deed was similar to the deed in the case of *Wood* v. *De Mattos* (1), and among other things it was provided that the estate should be administered as in bankruptcy. Shortly after the execution of this deed the bills in question were indorsed by *Mavrogordato* to a Mr. *Pappayanni* for the purpose of collection, and he subsequently re-indorsed them to the inspectors.

Mavrogordato was the holder of 800 shares in the company.

(1) Law Rep. 1 Ex. 91. 12 Jur. N.S. 78

and he was settled upon the list of contributories in respect of them, and on the 3rd of June, 1867, a call was made upon him for the amount of £18,000. *Carralli & Haggard* having claimed to prove against the company's estate upon the three bills, their claim was admitted by the Master of the Rolls. The official liquidator appealed.

Mr. *Southgate*, Q.C., Mr. *Bagshawe*, and Mr. *Bush*, for the Appellant:—

The deed had the effect of a bankruptcy of the same date, and the mutual credit clause in bankruptcy (sect. 171 of the *Bankrupt Law Consolidation Act*, 1849) must apply, and the claim on the bills must be set off against the counter-claim on *Mavrogordato's* estate for the calls. The case of *Oulds* v. *Harrison* (1) has no application, because there was no bankruptcy there. Even if *Pappayanni* had been the holder of the bills for value, which he was not, and they had afterwards come back to the assignees, the mutual credit clause would have applied: *Bolland* v. *Nash* (2); *Collins* v. *Jones* (3). The application of this clause is further illustrated by the cases of *Ex parte Staddon* (4); *Smith, Fleming, & Co.'s Case* (5); *Ex parte Cleland* (6); and *In re Duckworth* (7); which latter case was the converse of the present, the debt due by the company to the bankrupt contributory exceeding the amount due by him for calls. But the same principle must apply in either case, and the present case is really concluded by *In re Duckworth*, which, however, was not cited before the Master of the Rolls.

Mr. *Roxburgh*, Q.C., and Mr. *Bedwell*, for *Carralli & Haggard*:—

The property in the bills passed to *Pappayanni* by the indorsement, and even if they were indorsed to him without any consideration, and for the mere purpose of avoiding the set-off, the set-off could not have been pleaded by the acceptor in an action by the holder upon the bills. This is distinctly so laid down by Baron *Parke* in his judgment in *Oulds* v. *Harrison* (8). The intermediate indorsement to *Pappayanni* prevents the inspectors being

(1) 10 Ex. 572.
(2) 8 B. & C. 105.
(3) 10 Ibid. 777.
(4) 3 M. D. & D. 256.
(5) Law Rep. 1 Ch. 538.
(6) Ibid. 2 Ch. 808.
(7) Ibid. 578.
(8) 10 Ex. 577.

L. JJ. 1869 *In re* ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY. CARRALLI & HAGGARD'S CLAIM.

subject to the mutual credit clause. Equities of a collateral nature do not affect the indorsee of a promissory note: *Burrough* v. *Moss* (1). In the present case the bills related to a matter entirely collateral to the shares. *In re Duckworth* (2) does not affect the case, because there no question arose upon the law applicable to bills of exchange.

SIR C. J. SELWYN, L.J.:—

The present claimants are the inspectors under the deed of the 1st of June, 1866, and it has been properly admitted at the Bar that the effect of that deed, and that of the law of bankruptcy applicable to this case, is that the position in which the parties stand is the same as that in which they would have stood if *Mavrogordato* had become bankrupt on the day on which the deed was dated. It is not disputed that the bills in question were indorsed to *Pappayanni*, not for any valuable consideration, nor for his own benefit, but merely for the purpose of collection, and those bills were afterwards restored by *Pappayanni* to the inspectors, and they are now the persons upon whose claim we have to adjudicate. Under these circumstances, I think that the 171st section of the Bankruptcy Act, 1849, and the principle upon which Lord *Cairns* acted in the case of *In re Duckworth*, apply to the present case. I think that the cases of *Oulds* v. *Harrison* (3), and *Burrough* v. *Moss*, upon which so much reliance has been placed, have no application to the case before us, as in neither of those cases was there any bankruptcy. In the present case, I think that the inspectors cannot be in any better position than assignees in bankruptcy would have been, or than *Mavrogordato* himself would have been if he had not become bankrupt. It has been urged before us, that in consequence of *Pappayanni* having become the indorsee of the bills the right to sue was vested in him, and consequently the question of the right of set-off was affected. But I think that argument is completely displaced by the case of *Bolland* v. *Nash* (4), for in that case it appears that at the time of the bankruptcy the bills in question were held for value by third persons, but they afterwards, in consequence of having re-

(1) 10 B. & C. 558.
(2) Law Rep. 2 Ch. 578.
(3) 10 Ex. 572.
(4) 8 B. & C. 105.

ceived from other sources the amount of their debt, restored those bills to the assignees, and when the claim was made by the assignees, it was held that the section relating to set-off applied. I think that is a far stronger case than the present, where the bills were merely held by *Pappayanni* for the purpose of collection.

The Master of the Rolls does not appear to have had any intention of disputing or overruling the authority of any of the cases to which we have been referred, for they do not appear to have been cited before His Lordship: but his judgment seems to be founded upon some misapprehension of the case. Under these circumstances, I think that the claim of *Carralli & Haggard* must now be refused with costs, but that there should be no costs of the appeal, except those of the official liquidator, and he will have his costs out of the estate.

SIR G. M. GIFFARD, L.J.:—

I am clearly of opinion in this case that *Oulds* v. *Harrison* (1), has no application whatever. It was a mere action at law, and there was no bankruptcy. The claim here is by *Carralli & Haggard*, the indorsement to *Pappayanni* was not for value, and it is quite immaterial whether the bills got back. These gentlemen are in no better position than *Mavrogordato;* they are in the mere position of assignees, the mutual credit clause in bankruptcy applies, and for these reasons I am of opinion that the claim ought to have been disallowed. There really is, in substance, no distinction whatever in principle between this case and that of *In re Duckworth* (2).

Solicitors for the Official Liquidator: Messrs. *Davidson, Carr, & Bannister.*

Solicitors for Messrs. *Carralli & Haggard:* Messrs. *Peachey & Co.*

(1) 10 Ex. 572.

(2) Law Rep. 2 Ch. 578.

L. JJ.
1869
Jan. 11, 14.

In re WARREN'S BLACKING COMPANY.

PENTELOW'S CASE.

Company—Contributory—Conditional Allotment—Repudiation.

P. applied for ten shares in a company, the prospectus of which stated that £1 was to be paid on each share on application and £2 more on allotment. The directors accepted the application on the 1st of August, and on the 4th they wrote to *P.*, stating that they allotted the shares on payment of the balance of the allotment money on or before the 11th instant. Before that day had arrived *P.* discovered that there were misrepresentations in the prospectus, and wrote to the directors repudiating the shares and claiming a return of the deposit. *P.'s* name was entered on the register as on the 1st of August, but it was doubtful at what time the entry was really made. The company was soon afterwards wound up:—

Held (affirming the decision of *Malins*, V.C.), that the contract to take the shares was *in fieri* until the 11th of August, and that *P.* had a right to repudiate them up to that date. His name, therefore, was removed from the list of contributories.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of *Warren's Blacking Company, Limited.*

The company was formed in the year 1865, and registered on the 12th of June, 1865. The prospectus stated, among other things, that the objects of the company were to purchase, carry on, and extend the business of *Russell, Warren, & Co.*, blacking manufacturers; and that the capital was divided into shares of £10 each, £3 of which was to be paid up, namely, £1 on application for shares and the remaining £2 on allotment. Relying on the prospectus, Mr. *W. Pentelow*, on the 28th of July, sent in an application in the usual form, applying for ten shares, on which he had paid into the company's bankers £10 as a deposit, and agreeing to pay the rest of the allotment money and calls in respect of the shares to be allotted when due; and he thereby authorized the directors to insert his name on the register of members for the number of shares allotted to him.

On the 1st of August the directors passed a resolution that all the shares then applied for, including *Pentelow's*, should be issued.

On the 4th of August, Mr. *Norrish*, the secretary of the company, wrote to *Pentelow* a letter in the following terms:—

"Sir,—I am instructed by the directors to notify to you that they have considered your application, and hereby allot you ten shares in the company, on your paying on or before Friday, the 11th instant, to the *Bank of London, Threadneedle Street*, or *Charing Cross Branch*, the sum of £20, which, with the amount already paid by you in order that your application for shares might be considered, will make up the sum of £3 per share on the shares allotted to you."

After payment of the deposit of £10, *Pentelow* became aware that a bill had been filed by Mr. *Robert Warren* against the company for the purpose of restraining them from using the name of *Warren's Blacking Company*, and from the proceedings in that suit he ascertained that some of the statements in the prospectus were untrue. Accordingly, on the 10th of August, he wrote a letter to the secretary of the company as follows:—

"In reply to yours of the 4th instant, I beg to say that I cannot think of taking up the shares by advancing more money on them after what has taken place before the Vice-Chancellor, as it is very evident that the statements there made do not correspond with those in your prospectus. In consequence of which I shall feel obliged by your returning me the £10 already advanced."

In reply to this the secretary sent a letter to *Pentelow* on the 11th of August, in which he said:—

"In reply to your letter of this morning, I beg to inform you that what you allude to is perfectly an *ex parte* statement. Mr. *Hyatt*, traveller for the firm, will call on you in a day or two, and will furnish you with any further information you may require."

Pentelow still refusing to pay the balance payable on the allotment, an action was, on the 15th of December, 1865, brought against him in the Court of Queen's Bench, to which *Pentelow* pleaded several pleas denying his liability, and pleading that he had repudiated the shares after discovering the misrepresentations of the prospectus.

In the month of December, 1866, while the action was still pending, an order was made for winding up the company; and

L. JJ. 1869

PENTELOW'S CASE.

Pentelow's name was included in the list of contributories. On the production of the register of the shareholders kept by the directors, the entry of *Pentelow's* name, as the holder of ten shares, appeared on the date of the 1st of August, but the entries did not seem to have been made in strict chronological order, and there was no evidence on what day the entry was actually made.

Under these circumstances, the Vice-Chancellor directed *Pentelow's* name to be removed from the list of contributories; and from this decision the official liquidator appealed.

Mr. *Fry*, for the Appellant:—

We contend that the acceptance of *Pentelow's* application by the company was unqualified, and that as soon as it was communicated to *Pentelow* the contract with him was complete, and he had no power to repudiate it. The mention of the 11th of August for the day of payment of the subsequent instalments did not introduce a new term into the contract, nor render it conditional upon his payment of the money. It was nothing more than naming a reasonable time, to which *Pentelow* would have been entitled under the words of the prospectus, which stipulated that the £2 was to be paid "on allotment."

We admit that time was of the essence of the contract; but that fact does not give the purchaser power to repudiate the contract before the time for payment arrives. There was a contract to take the shares *in præsenti*, and the fact that the payment was to be postponed for a few days made no difference: *Ex parte Barrett* (1). *Pentelow's* name was entered on the register on the 1st of August, the day when the shares were allotted. If the contract had been considered conditional, the registration would have been postponed.

The claim to repudiate the shares on the ground of misrepresentation cannot be sustained. *Pentelow* has failed to establish any such case, and if he had, he ought at once to have taken steps to get his name removed from the register; by not doing so he holds himself out to the creditors as a shareholder: *Oakes* v. *Turquand* (2); *Peel's Case* (3).

(1) 2 Dr. & Sm. 415. (2) Law Rep. 2 H. L. 325.
MS. 234 (3) Law Rep. 2 Ch. 674.

L. JJ.
1869
PENTELOW'S CASE.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the Respondent:—

The new term introduced into the contract made the contract incomplete till the day named for payment. Until that day *Pentelow* had a right to repudiate the contract: *Oriental Steam Company* v. *Briggs* (1); *Duke* v. *Andrews* (2); *Addinell's Case* (3). The mere fact of the directors entering the name on the register is not sufficient to make the contract complete. That fact was not communicated to *Pentelow;* on the contrary, the directors treated the contract as still *in fieri*, and endeavoured to induce him to withdraw his repudiation, and accept the shares: *Gunn's Case* (4).

But there is no evidence in the present case that the name was entered on the register till after the repudiation. The names are not in strict chronological order, and it is more probable that the names were entered afterwards in anticipation of the winding-up. The 25th section of the *Companies Act*, 1862, provides that the register shall contain "the date at which the name of any person was entered on the register as a member." There is no proof that this was complied with: *Ex parte Gledhill* (5).

Pentelow did all that was necessary to get rid of his liability. As soon as he discovered the misrepresentations in the prospectus he not only repudiated the shares, but claimed a return of the deposit. The fact of his name remaining on the register is therefore immaterial: *Fox's Case* (6); *Hebb's Case* (7).

Mr. *Fry*, in reply:—

The names in the register are all in chronological order, except in a few instances, which admit of explanation. Where there is no proof to the contrary, it must be assumed that the register is regular.

SIR C. J. SELWYN, L.J.:—

This is an appeal from a decision of the Vice-Chancellor, holding that *Pentelow* ought not to be included in the list of contribu-

(1) 10 W. R. 125; 31 L. J. (Ch.) 241.
(2) 2 Ex. 290.
(3) Law Rep. 1 Eq. 225.
(4) Law Rep. 3 Ch. 40.
(5) 9 W. R. 791.
(6) Law Rep. 5 Eq. 118.
(7) Law Rep. 4 Eq. 9.

L. JJ. 1869 PENTELOW'S CASE.

tories of *Warren's Blacking Company, Limited.* It appears that the company was constituted in the usual manner as a limited company, and that on the 28th of July, 1865, *Pentelow* sent an application for ten shares in the usual form. On the 1st of August the directors held a meeting, at which they resolved that the secretary should allot all the shares to those who had applied for them. Accordingly, on the 4th of August the secretary wrote to *Pentelow* a letter, not in the usual form, but as follows:—[His Lordship read the letter.] That letter, it is clear, introduces a new date into the contract, on or before which date the money is to be paid and the shares to be allotted. Therefore the contract remained *in fieri* till that day. Before that date, however, *Pentelow* wrote a letter to the secretary, refusing to take the shares, and asking for a return of the deposit. The letter is dated the 10th of August, and is as follows:—[His Lordship read the letter.] It is not disputed that circumstances existed which would have justified him in taking proceedings to repudiate the contract. But in answer to the letter the directors do not insist that the shares were already his, but say that the statements before the Vice-Chancellor were *ex parte* statements, and that he should have further information. Therefore it is clear that at that time the contract was still *in fieri;* that he repudiated it under circumstances which justified him in doing so; and that, so far from the directors objecting, they wrote to him to say that they would give him further information.

His conduct afterwards was perfectly consistent; he persistently refused to pay any more of the allotment money, claimed the return of the deposit which he had paid, and defended the action brought against him by the company for calls. I think, therefore, that there has been a consistent repudiation of the shares, and that this was done before the date fixed by the directors for the completion of the contract.

It was argued that his name was entered on the register under the authority of his letter of application, and that he cannot now escape from liability to the creditors. But the entries in the register are not satisfactory. The book is produced, and it shews that the entries could not have been made in chronological order; and it is inconsistent with the directors' own proceedings to sup-

pose that *Pentelow's* name was entered before they wrote to him the letter of the 11th of August.

I am anxious not to throw any doubt upon those decisions which have held that persons who have become members of a company, and who have taken the chance of its becoming a prosperous concern, shall not afterwards, in the event of failure, be allowed to escape from responsibility, or to defeat the claims of creditors, by setting up some variance between the prospectus and the memorandum or articles of association, for I entirely concur in the justice of those decisions; but this is no case of that kind. Within the time limited *Pentelow* repudiated the contract, and he has all along consistently done so. I think, therefore, the order of the Vice-Chancellor is right, and the appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J. :—

I am of the same opinion. This case is clearly distinguishable from the case of *Oakes* v. *Turquand* (1). In that case the transaction was complete. It was a contract which the shareholder could have avoided, but the directors could not. But here the contract was *in fieri* until the 10th of August, and the company might have repudiated it till that date. Before that time *Pentelow* discovered that he had been induced to apply for the shares by fraud; and before the 11th of August he repudiated the contract. Nothing had been said to lead him to suppose that his name was put on the register. On the contrary, he received this letter of the 4th of August, which, if it meant anything, postponed the allotment till the 11th of August. Before that date arrived he repudiated the contract. But besides this, there is no evidence that his name was on the register before the time when he had repudiated the contract; on the contrary, the book, when produced, convinces me that he was not placed on the list till after that date. It is not enough to produce a book kept as this book was, containing an entry purporting to have been made at a particular date, when the *res gestæ* lead to a different conclusion.

On both grounds, therefore—that *Pentelow* repudiated the contract, and that his name was not on the register before such repu-

(1) Law Rep. 2 H. L. 325.

L. JJ. 1869 PENTELOW'S CASE.

diation—I think his name must be removed from the list of contributories; and the appeal must be dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *J. & W. Galsworthy.*

Solicitors for *Pentelow*: Messrs. *Burt & Stevens.*

L. JJ. 1869 *Jan.* 21.

In re ALDBOROUGH HOTEL COMPANY.

SIMPSON'S CASE.

Company—Acceptance of Shares—Qualified Acceptance—Condition that Shareholder should have Building Contract—Attending Meetings—Waiver.

S., a builder, wrote a letter to the directors of a hotel company, stating that in consideration of the contract for making the alterations at the hotel being secured to him, he agreed to subscribe for 300 shares, and pay the deposit, as soon as he was satisfied that 1500 shares, including his, had been subscribed for, and that the directors had passed a resolution that he should have the contract for the alterations. The calls on the shares were to be set off against the amount due on the contract. The directors accepted the application on the terms of his letter, and passed a resolution to the effect required. They then sent an unconditional notice of allotment of 300 shares to *S.*, and entered his name for that amount on the register. *S.* did not return the notice of allotment; but having ascertained that the resolution had been passed and 1500 shares taken up, sent in a formal application and paid the deposit. No further allotment was made to *S.*: the certificates were not delivered to him, nor was he called upon to pay any calls. He afterwards attended two meetings of shareholders for the purpose of seeing that the contract was secured to him. No contract for alterations was ever prepared, and shortly afterwards the company was wound up voluntarily:—

Held (affirming the decision of the Master of the Rolls), First: that the contract to take the shares was conditional on *S.* having the contract to make the alterations:

Secondly: that the condition was not performed by the mere passing of the resolution that *S.* should have the contract:

Thirdly: that *S.* had not waived the condition by not returning the notice of allotment, or by attending the meetings of shareholders.

S. was, therefore, held not to be a contributory of the company.

THIS was an appeal from a decision of the Master of the Rolls removing the name of *Samuel Simpson* from the list of contributories of the *Aldborough Hotel Company, Limited.*

On the 23rd of October, 1865, *Simpson*, who was a builder, wrote to the directors of the company a letter of that date in the following terms:—"In consideration of my being secured the contract for carrying out the alterations and additions to the *Aldborough Hotel*, and the contract amounting to £9000, I hereby agree to subscribe for and take 300 shares in the company, and to pay the deposit on the said shares as soon as the secretary of the company shall satisfy me that 1500 shares (including my 300) have been subscribed for, and that the directors of the company have by resolution duly confirmed agreed that I shall carry out the said alterations and additions upon the following conditions."

The conditions were—(1) that *Simpson* should be paid in cash on the architect's certificate; (2) that the prices for the several trades should be fixed by a surveyor appointed jointly by the directors and *Simpson*; (3) that all calls on the 300 shares after payment of the £1 on deposit, including the £1 10*s.* on allotment, should be written off the amounts coming to him on the architect's certificates; (4) that *Simpson* should have the right of selling the shares as soon as they had been delivered to him.

The receipt of this letter was acknowledged by the secretary of the company in a letter of the 28th of October, which was as follows:—"We hereby acknowledge that your application for 300 shares in this company, and your cheque for deposit on the same, are received, subject to the terms of your letter of the 23rd inst. to the directors."

It appeared that the deposit was not really paid till afterwards, as subsequently mentioned. On the 7th of November the directors passed a resolution that *Simpson* should have the contract for carrying out the alterations and additions to the hotel upon the terms of his letter, and on the same day they allotted him 300 shares. On the 11th of November notice of the allotment was sent to *Simpson*, and was handed by him to Mr. *Markby*, his solicitor, who, on his behalf, declined to accept the allotment until he had inspected the books of the company. On the 17th of November, Mr. *Markby* ascertained by inspection of the books, that the directors had passed the above-mentioned resolution, and that 1500 shares, including the 300 allotted to *Simpson*, had been subscribed for; and, accordingly, on the 18th of November, *Simpson* made a formal appli-

L. JJ. 1869 SIMPSON'S CASE.

cation for the shares, and paid £300 to the company's bankers as a deposit of £1 on each of them. No further notice of the allotment was sent to him, and he neither received nor applied for certificates of the shares.

Immediately on the allotment of the shares *Simpson's* name was entered on the register, and the number of his shares was subsequently entered, and his name still remained on the register when the company was wound up.

Shortly after the allotment the architect was instructed by the directors to make drawings of the proposed alterations in the hotel for the purpose of preparing a contract; and *Simpson* prepared estimates of the work to be done; but the directors found it impracticable to carry out the alterations as proposed, in consequence of the circumstances of the company, and no contract was ever drawn up. *Simpson*, however, did various works for the company, for which he received sums amounting to £619. Notices were sent to *Simpson* of the meetings of the shareholders, and he attended two of them, at which the subject of the contract was expected to be considered; but he was not called on to pay the remainder of the allotment money, or any of the subsequent calls which were made.

In January, 1867, the company passed and confirmed resolutions for its voluntary winding up, and in February, 1867, the winding-up was ordered to be continued under the supervision of the Court.

Simpson's name was placed upon the list of contributories for 300 shares, but the Master of the Rolls ordered it to be removed from the list. From this decision the liquidator appealed.

Mr. *Swanston*, Q.C., and Mr. *Chitty*, for the Appellant:—

The contract in this case was not conditional as in *Pellatt's Case* (1). It was an absolute contract to take the shares, accompanied by a collateral agreement that *Simpson* should have the building contract. The stipulations which *Simpson* made when he applied for the shares were:—First, that a resolution should be passed by the directors that he should have a building contract to a certain amount; and, secondly, that 1200 shares should be taken up besides those which he applied for. Both these terms

(1) Law Rep. 2 Ch. 527.

were complied with, and Mr. *Markby*, his solicitor, was satisfied by inspection of the books that this was the case, before the deposit was paid and the shares allotted. *Simpson's* name was then entered on the register, and he became the *dominus* of the shares, and might have sold them in the market. He cannot now evade his liability to creditors by repudiating them. The case is governed by *Elkington's Case* (1), from which it differs only in the circumstance that *Elkington* was called upon to pay calls which *Simpson* was not required to do; but that was in part performance of the contract, by which it was stipulated that the calls should be set off against any money that might be owing to him for the works.

[SIR C. J. SELWYN, L.J.:—Suppose, immediately after *Simpson* had paid his deposit, the directors had passed a second resolution that no alterations at all should be made. Do you say that he would have been still bound to take the shares.]

He would still have been a shareholder. He might have had a remedy against the company for breach of their agreement; but if he allowed his name to remain on the register he would be a contributory. There was not an entire failure of consideration for his taking the shares; for, in the first place, the shares themselves, which at that time were considered valuable, were the consideration for the contract; and, in the second place, he did perform works for the company to the amount of £619.

We also contend, that if the contract to take the shares was conditional, *Simpson* waived the performance of the condition by attending the meetings as a shareholder.

Mr. *Jessel*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *J. Kaye*, for *Simpson*, were not called on.

SIR C. J. SELWYN, L.J.:—

Two questions are involved in this case. First, whether the contract to take the shares was conditional; secondly, if so, whether the condition was complied with.

The first of these questions is clearly stated by Lord *Cairns*, in

(1) Law Rep. 2 Ch. 511.

L. JJ. 1869 SIMPSON'S CASE.

his judgment in *Elkington's Case* (1), where he says: "The real point for determination in this case might be said to be this: did Messrs. *Elkington* intend and agree to become members and shareholders *in præsenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did Messrs. *Elkington* agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?"

In the present case the same questions apply, and they seem to me to be satisfactorily answered by the two letters of the 23rd and 28th of October, 1865. The first letter is as follows:— [His Lordship read the letter.] The whole transaction is based upon these words: "in consideration of my being secured the contract of carrying out the alterations and additions to the hotel, and the contract amounting to £9000, I hereby agree to subscribe. Then follows the letter of the secretary, on the 28th of October, acknowledging that the application was received "subject to the terms of your letter of the 23rd instant." We have, therefore, the application proposed as a conditional contract, and accepted by the directors as conditional. We also find, that throughout the subsequent transactions all parties acted as if the contract was conditional. It is true that there was an allotment, and that *Simpson's* name was entered on the register; but he was never asked to pay any calls on the shares. It was argued that this was in part performance of the contract. But the condition of his letter was that the calls were to be set off against the amount due for works done, and payable under the architect's certificate, whereas there were no such works, and no architect's certificate; therefore what took place could not have been in part performance of the contract. And although *Simpson* retained the letter of allotment and handed it to his solicitor, he did not apply for the certificates of the shares. He had a right to assume, at that time, that the directors would carry the agreement into effect; and his retaining the letter of allotment was not, therefore, inconsistent with his considering the contract conditional. If, indeed, he had done anything inconsistent with this supposition—if he had applied for the certificates, or parted with the shares in the market—he might have been in a

(1) Law Rep. 2 Ch. 522.

different position; but he did nothing of the kind. The fact of his attending the meetings is not, in my opinion, important, as he went there for the purpose of watching the proceedings with regard to the building contract.

We come, therefore, to the second question, whether the condition has been performed. The condition was, that *Simpson* should have the contract to make alterations and additions in the hotel; none were specified; they were left indefinite, except that they were to amount to £9000. It is obvious that the directors were the persons to judge what works were to be done, and that something had to be done by them before the contract could be placed in his hands. The liquidator contends that the resolution was the only thing to which *Simpson* looked. But the directors were to take the next step by determining what the alterations were to be, and it is unreasonable to contend that they had performed the condition when they had passed no further resolution. Suppose, as I suggested during the argument, they had passed a resolution that there should be no alterations at all, could it be contended that the condition had been performed? Tried by this test it is clear that until some subsequent step the resolution that was passed was a nullity. I am, therefore, of opinion that the condition on which *Simpson* agreed to take the shares was never performed, and that the case falls within the class of cases of which *Pellatt's Case* (1) is an example, and that *Simpson* never became a shareholder of the company. The appeal must, therefore, be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

I concur in the opinion of the Master of the Rolls and the Lord Justice. There appear to me to be three questions in this case; first, was there a condition annexed to the contract? secondly, was it performed? thirdly, was it waived?

As to the first question I have no doubt that there was a condition. The whole matter must be referred to the letter of the 23rd of October, and to the expectation which *Simpson* had that the terms of that letter would be performed. That letter contains

(1) Law Rep. 2 Ch. 527.

L. JJ. 1869 SIMPSON'S CASE.

a distinct stipulation that there was to be a building contract for the alterations at the hotel. Then was this stipulation performed? It was argued that it was performed by passing the resolution of the 7th of November. But what does the secretary say? He states in his affidavit that it was intended to go on with the alterations, and that the architect had been instructed to make drawings of the alterations for the purpose of preparing a contract; but the contract was never prepared. It is clear, therefore, that there was a condition, and that it was never performed; and that the case is similar to *Pellatt's Case* (1), and not to *Elkington's Case* (2). With respect to the third question, I am of opinion that *Simpson's* attendance at the meetings for the purpose of taking care that the contract for the works was secured to him, had no effect in waiving the condition, and that his name must, therefore, be removed from the list of contributories.

Solicitors for the Liquidator: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitors for *Simpson:* Messrs. *Maynard, Son, & Co.*

L. C. 1868 *July* 22.

PICKETT *v.* PACKHAM.

Freehold or Leasehold—Presumption.

By an indenture of lease dated 1598 a farm was demised for 1000 years, with a covenant by the lessor to convey the fee simple to the lessee within five years if required. The farm was assigned as a leasehold in 1777, since which time it had been three times devised as freehold, and on the Court rolls of the manor of which the farm formed part the land was called freehold:—

Held, that, under the circumstances, it remained leasehold as between the heir and the administrator of an intestate owner.

Order of the Master of the Rolls varied.

Jeffreys v. *Machu* (3) distinguished.

BY an indenture of lease dated the 21st of March, 1598, *George Goreing* did demise a farm called *Longs* to *Stephen Ockenden*, his

(1) Law Rep. 2 Ch. 527. (2) Law Rep. 2 Ch. 511.
(3) 29 Beav. 344.

executors, administrators, and assigns, for 1000 years, yielding yearly unto *George Goreing*, his heirs and assigns, the sum of 4*s.* and paying to the said *George Goreing*, his heirs and assigns, lords of the manor of *Hurstpierpoint*, after the death of every tenant and at every alienation, one heriot and one year's rent in the manner of a relief. And the indenture contained a covenant by *George Goreing*, during the space of five years then next ensuing, at the request and cost of *Ockenden*, to do any act for further assurance for the tenure aforesaid, or otherwise for the conveyance of the fee simple of the premises to *Ockenden*, his heirs and assigns, as by him should be reasonably required.

In 1700, 1718, and 1722, this property had been assigned as leasehold, and by a deed dated the 2nd of July, 1777, it was assigned to *John Lindfield* for the residue of the term of 1000 years.

In 1779 *John Lindfield*, by his will, devised all the residue of his estate, real and personal, unto his brother, *William Lindfield*. In 1806 *William Lindfield* devised to *John Pickett* and his heirs "all the premises called *Longs*," charged as therein mentioned. In 1829 *John Pickett* devised *Longs* by name to *Henry Pickett*, his heirs and assigns, charged as in the said will mentioned. In 1836 *Henry Pickett* devised "his farm, called *Longs*," to his son, *John Pickett*, his heirs and assigns. *John Pickett* died intestate in 1861, and on his death *Edward Pickett* entered into possession as heir-at-law, and afterwards died, leaving *C. Packham* his executor and devisee in trust.

A question then arose between *Packham*, as representing the heir-at-law of *John Pickett*, and *W. V. Pickett*, the administrator of *John Pickett*, and the next of kin of *John Pickett*, as to whether this farm was, under the circumstances, freehold or leasehold. Several entries in the Court rolls of the manor were found, shewing that the farm had always been called a freehold by the lord and the homage; and it was contended on behalf of those claiming under the heir-at-law that a conveyance of the fee must be presumed to have been made in pursuance of the covenant in the deed of 1598.

The Master of the Rolls held the farm to be freehold, and the administrator and next of kin of *John Packham* appealed.

L. C. 1868

PICKETT v. PACKHAM.

Mr. *W. M. James*, Q.C., Mr. *Waller*, and Mr. *Droop*, for the Appellants:—

It has been argued that a base fee has been created by the owners of this land, but there can be no such thing. The entries on the Court rolls are idle, and were only meant to remind the lord of the heriot. The farm has only been treated as freehold in wills, and the land would pass by them whether freehold or leasehold. The character of land cannot be changed in this manner.

Mr. *Southgate*, Q.C., and Mr. *Bristowe*, for parties in the same interest.

Mr. *Gardiner* (with him Mr. *Jessel*, Q.C.,), for *Packham*, representing the heir of *John Pickett*:—

If this land had been leasehold *Henry Pickett's* executors would have entered and not the devisee. The entries in the Court roll are clear, and shew that the lord must have conveyed the fee: *Jeffreys* v. *Machu* (1) is a strong authority in our favour. For sixty years this land has been treated by the owners as freehold.

LORD CAIRNS, L.C.:—

I have no doubt whatever about this case. I do not mean to express any opinion whether the facts in *Jeffreys* v. *Machu* warranted the conclusion arrived at in that case or not, for they seem to be very widely different from the facts in this case.

In July, 1777, we have the predecessor in title of *John Pickett*, the intestate in this cause, distinctly acknowledging and admitting that he was dealing for the remainder of a term in the property, that he was buying it and taking an assignment of it, and that the title which he was thus acquiring to the property was the title of a termor, and recognising the origin of that term as being in the year 1598 by virtue of the lease which was made that year. Then there was a general gift in 1779 by *John Lindfield*, by which the property passed to *William Lindfield*, and in 1806, *William Lindfield* devised it to *John Pickett*. There is no doubt that the property passed, because the testator used terms which identify

(1) 29 Beav. 344.

the farm he was speaking of, but I cannot take this as any evidence that the property had assumed any different character since it had been purchased. In the same way in 1829 and 1836 the various devises treating it as freehold are devises by persons who all claimed under the *John Lindfield* who had bought the property for the remainder of the term, and all derived their title from him.

During those periods and at several different epochs it is said that there were entries in the Court roll with reference to the rent and heriot and the services rendered with respect to these lands. Now, it appears to me that those entries in the Court roll are as much at variance with the theory that would make this land freehold as with the theory that would make it leasehold, because if a presumption arises that the covenant in the deed of 1598 to assure the fee simple within five years was complied with, then the fee simple would have been conveyed to *Ockenden,* but then there would have been an end to rent, and services, and heriots, and to all the things mentioned in the Court roll. Therefore it seems to me that the entries in the Court roll are entirely inconsistent with the presumption that any fee simple was conveyed to *Ockenden,* and although they are not quite consistent with the demise made by the deed of 1598, still there is no difficulty in accounting for their being made, because so long as the demise continued there was a rent reserved, and a heriot to be paid, and, therefore, notice of those payments and of that reservation was taken on the Court roll. I do not, therefore, attach to the entries on the Court roll between the year 1777 and the death of *John Pickett,* sufficient weight to countervail the difficulties of presuming a conveyance in fee simple, and of countervailing the express wording of the original lease and of the assignment of 1777.

Then, going back to the original lease of 1598, we find that it was dealt with as a subsisting lease in 1700, in 1718, and in 1722, by proper assignments of the 1000 years' term. The lease, therefore, was acted on for a century and a quarter at intervals after the time it was made, and rent was paid all the time upon a footing which could only be that of the lease. It would seem to me a violent presumption in that state of things to hold that the tenure

L. C. 1868 PICKETT v. PACKHAM.

created by a deed of lease had been turned in some way or other into a tenure by freehold.

With all respect to the Master of the Rolls, I think that the property is proved to be of leasehold tenure, and the order made must be varied accordingly.

Solicitors for the Appellants: Messrs. *Palmer & Bull.*
Solicitors for the Respondents: Messrs. *Hopwood & Sons.*

L. C. 1869 *Jan.* 10, 11.

ATTORNEY-GENERAL *v.* ELY, HADDENHAM, AND SUTTON RAILWAY COMPANY.

Railways Clauses Act, 1845, *ss.* 16, 46, 53, 56—*Level Crossing—Public Convenience—Attorney-General.*

If a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, according to sect. 46 of the *Railways Clauses Act*, 1845, but the highway may be diverted, under sects. 16, 53, and 56, to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge.

Decree of the Master of the Rolls affirmed.

THE *Ely, Haddenham, and Sutton Railway Company* were, by their special Act, empowered to carry their railway across the turnpike road leading from *Ely* to *Cambridge*, by a level crossing. The line of railway also crossed a road leading from *Thetford* to *Grunty Fen*, not far from the place where the level crossing over the turnpike road would be made. The railway company, therefore, diverted the *Grunty Fen* road, taking it for some distance parallel to the railway; then across the railway at the above-mentioned level crossing, and then back into the line of the *Grunty Fen* road; the altered road being altogether about 150 yards longer than the old road, and making two sharp turns.

This information was filed at the relation of ten inhabitants of *Thetford*, owning land in *Grunty Fen*, and prayed that the railway company might be restrained from obstructing the *Grunty Fen* road, or, at any rate, from obstructing it until they had made another road equally convenient; and that they might be ordered to construct all necessary bridges and other works.

The whole country was on a dead level, and the company produced evidence that the *Grunty Fen* road was not so much used by persons going to *Grunty Fen* as by persons going from *Thetford* to *Ely* or *Cambridge*, and that the arrangement they had made was more convenient for the public than that which the relators proposed, which would take the road over a bridge at least seventeen feet high. It appeared that, according to the plans deposited by the company, the railway would have had two level crossings, one across the turnpike road as altered, and the other across the *Grunty Fen* road. The Board of Trade, however, refused to sanction two level crossings, unless the company kept a man to attend to each, and the company thereupon agreed with the trustees of the turnpike road to divert the turnpike road to the south of the line, and then diverted the *Grunty Fen* road to the north in the manner complained of, and so carried both roads across at one level crossing.

The Master of the Rolls dismissed the information on the ground that a bridge over, or a tunnel under, the railway would be more inconvenient than the actual arrangement. The case is reported (1), where the facts of the case are more fully stated.

The Attorney-General appealed.

Mr. *Jessel*, Q.C., and Mr. *G. N. Colt*, for the Appellant:—

The Court has nothing to do in a case like this with the convenience of the public, but must decide on the law as applicable between the parties: *Raphael* v. *Thames Valley Railway Company* (2). The Master of the Rolls has said that the Attorney-General may proceed at Law, but the Crown may proceed in any Court, a Court of Equity is, therefore, bound to decide in this case, and cannot leave the parties to their remedy at Law: *Dan.* Chancery Practice (3). The company have no right to stop up a road, but must carry it either over or under the railway by sect. 46 of the *Railways Clauses Act*, 1845. Here they have actually stopped up one road and say they have given us another road. Sect. 53 of the *Railways Clauses Act*, 1845, does not apply, and sect. 46 compels the company to make a bridge.

(1) Law Rep. 6 Eq. 106. (2) Law Rep. 2 Ch. 147, 150.
(3) 3rd Ed. p. 5.

L. C.
1869
ATTORNEY-GENERAL v. ELY, HADDENHAM, AND SUTTON RAILWAY CO.

Sir *Richard Baggallay*, Q.C., and Mr. *Dryden*, for the company:—

The company have a right to cross this road, and must do so either in the way proposed or by a bridge. There can be no doubt as to the balance of convenience, and the relators only wish to extort something from the company. Sect. 16 of the *Railways Clauses Act*, 1845, gives us power to divert the road: *Rangeley* v. *Midland Railway Company* (1), and the Court must look to the convenience of the public.

[The LORD CHANCELLOR:—The relators, in fact, say that the company must give them what they are by law entitled to, or else something which will suit them better. It does not follow that the Court will not give effect to such a claim.]

Even if there has been a slight excess of power by the railway company, they are a public body, and have a public duty to perform, and the Court will exercise its discretion as to interfering. The sections of the *Railways Clauses Act* must be considered separately. Sects. 16, 46, and 53, give us three alternatives, and we have taken one. This is a suit by the Attorney-General on behalf of the public, and the Court must look to the public convenience. The traffic from *Thetford* to *Grunty Fen* is very small, and for every other purpose, such as going from *Thetford* to *Cambridge* or *Ely*, the road as altered is more convenient.

Mr. *Colt*, in reply:—

Sects. 16 and 53 refer to a temporary diversion only, and, at any rate, sect. 46 is clear, and cannot be got over. The plans proposed by the company shewed a level crossing over the line of our road, to which the relators do not object. If they had been aware that this diversion was intended, they might have opposed the bill. Whether the traffic to *Grunty Fen* is large or small, the owners of land in it are not to be deprived of their rights because a railway has been made, and because the plan proposed will be more convenient to other people.

(1) Law Rep. 3 Ch. 306.

LORD HATHERLEY, L.C. :—

I have examined the different sections of the *Railways Clauses Act*, and it appears to me that there is a mode by which they can be very well reconciled, if reconciliation be needed. By the 16th section the Legislature has conferred large powers upon railway companies in dealing with public roads, but has made those powers subject to the other provisions in the Act, and to the provisions in the special Act. By this section the company is empowered to divert or alter, as well temporarily as permanently, the course of any roads, streets, or ways, or to raise or sink the level of any roads, streets, or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway, as they may think proper.

Then the 46th section, to which those powers are subjected, says: "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent and descent, by this or the special Act in that behalf provided."

What seems to me to have been intended by the Legislature, taking the two clauses together, is, that if the company, in making the railway and carrying it along its course, are obliged either to carry it over or under or alongside a road, then in constructing the line they shall have the power of diverting the road for all or any of those purposes. They may carry it parallel with the railway, and on a level with it, for a certain distance, so as to pass the railway afterwards, where they would not be prevented by the 46th section. The 46th section was intended to grant protection to the public against the railway crossing public roads at a level; and there is nothing to prevent the company from permanently diverting a road under the powers of the 16th section so as to bring the crossing to a point where the levels would be more suitable for a bridge or tunnel, or, as in this case, to a point where a level crossing is permitted by the special Act. For instance, where the railway meets a very ill-made country road which pursues an extremely tortuous course, it would be very absurd for the railway to cross that road and recross it at every turn. In that

L. C. 1869

ATTORNEY-GENERAL v. ELY, HADDENHAM, AND SUTTON RAILWAY CO.

case the company would, under the 16th section, divert the road by carrying it parallel and always on one side of the railway, until it came to a place where it was necessary to carry it across in order to complete the arrangement for traffic. In some cases they might so widen and divert the road as not to cross it at all, and that, of course, would be much better.

Then as to the 53rd and the following sections, they run thus: "If in the exercise of the powers by this or the special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage-road, horse-road, tram-road, or railway, either public or private, so as to render it impassable for, or dangerous or extraordinarily inconvenient to, passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall, at their own expense, maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." That seems to refer to the two cases of permanent as well as temporary work; and in each case special remedies are provided by the 54th and 55th sections in case of default. Then the 56th section provides that if the road so interfered with can be restored compatibly with the formation and use of the railway, it shall be restored; and if it cannot be restored completely, there is to be a substituted road.

The Act, in fact, says this: If you require to divert a road and carry it parallel to your railway without interfering with the traffic along it, and lead it on fairly and reasonably to its terminus, instead of crossing it over and over again, you are at liberty to do so; but if you do not choose to do so, then, according to the 46th section, every time you cross the road you must make a carriage road over or under the railway. If you take a part of the road and use it permanently as part of the railway, then, under the 56th section, you must make a new road as convenient as may be.

It was argued that this road was scarcely used as a road to *Grunty Fen*, and was only used as a road to *Ely*, but it is clear that the *Grunty Fen* road was a road which persons were always entitled to use before the turnpike road was thought of, and those who used it cannot be told that they are accommodated by the *Ely*

road, or that they are less numerous than those who go by the public road to *Ely*. The rights of those going to *Grunty Fen* cannot be destroyed on the plea of giving additional benefits to those going in another direction. As to the argument that the Attorney-General represents the whole public, he represents the whole public in this sense, that he asks that right may be done and the law observed. The law is not observed by giving advantages to persons going to *Ely* to the detriment of those going to *Grunty Fen*. The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed.

Having laid down what I conceive to be the reasonable interpretation of the Act, I will apply it to the facts. The company have arrived at a point where four roads meet, and as regards the *Ely* road, it is not disputed that they have acted consistently with the law and in conformity with the provisions of their Act. But as to the *Grunty Fen* road, it has been carried by the company up to the point where they may by law cross the *Ely* road at a level, and then they take it across the railway and bring it back to the old *Grunty Fen* road, making a circuit of a certain length. Then they ask the Court to give this construction to the 16th section coupled with the 46th and 53rd: They find a place where they must do one of two things; they must either make a bridge, according to the 46th section, or must give accommodation as described in the 53rd section; and they say that, under the 16th section, if they make the road as convenient as they can with reference to the subsequent provisions in the 54th, 55th, and 56th sections, they have a right to do it by carrying the road alongside the railway, and they say that that is as convenient a road as they can possibly give compatibly with the making of the railway. The road must be diverted either vertically or horizontally—either by carrying it over or carrying it parallel with the railway. The road parallel to the railway is quite as convenient as the road over the railway; and thus the company has complied with the terms of the 56th section, and has given as convenient a road as is compatible with the making of the railway. The company, therefore, avail themselves of the option, and bring themselves within the 16th section.

L. C. 1869 — ATTORNEY-GENERAL v. ELY, HADDENHAM, AND SUTTON RAILWAY CO.

The Court is not setting itself up as an engineer, but is construing this Act of Parliament, and in doing so I cannot but see that this road must be diverted one way or the other, either vertically or horizontally; that if it is diverted vertically, it will be necessary to drag waggons up a height of seventeen feet; while if it is diverted horizontally, those who use the road will only have occasion to turn two sharp corners, and go round a short distance. I must come to the conclusion that the Act has been fairly complied with, and by the conjoint operations of the 56th and 16th sections that has been done by the Defendants which is required by law to be done. I come to the same conclusion as the Master of the Rolls; possibly not exactly for all the reasons expressed by him, although I am not at all clear that his view was not precisely the same in substance as mine. At all events, I come to the conclusion that the decree was right, and that the appeal must be dismissed with costs.

Solicitors for the Relators: Messrs. *Kingsford & Dorman.*
Solicitor for the Defendants: Mr. *J. Wheeler.*

L. C. 1869 — *Jan. 25.*

HAWKINS *v.* MALTBY.

Custom of Stock Exchange—Sale of Shares—Privity—Indemnity.

The Plaintiff, a holder of forty shares in a public company, agreed, through his brokers on the *Stock Exchange*, to sell that number to a jobber for £202 10*s*. The Defendant subsequently directed his broker to buy 100 shares; and, in accordance with the custom of the *Stock Exchange*, the name of the Defendant was passed to the Plaintiff's brokers as the purchaser of the forty shares. The Plaintiff executed a transfer deed of the shares to the Defendant, the consideration afterwards inserted by the Plaintiff's brokers being £145, which was the price the Defendant had agreed to pay. The Defendant paid to the Plaintiff the £145, and received the deed and the share certificates, the difference between the £145 and £202 10*s*. being paid by the jobber.

The Defendant never executed the deed, or registered the transfer, or repudiated the sale, and the company was ordered to be wound up:—

Held, that there was a contract between the Plaintiff and the Defendant, entitling the Plaintiff to indemnity by the Defendant.

Decree of the Master of the Rolls affirmed.

THE Plaintiff in this case was the holder of forty shares in the *Imperial Mercantile Credit Company, Limited*, and, through his

brokers, agreed to sell that number of shares to one *Mackenzie*, a stock jobber, for £202 10*s*., for the 30th of March. The Defendant on the 26th of March directed his brokers to buy 100 shares, and they bought that number, and, in accordance with the custom of the *Stock Exchange*, the name of the Defendant was passed as the purchaser of the forty shares. The brokers of the Plaintiff prepared a deed of transfer, which was signed by the Plaintiff. They then filled in the consideration with the sum of £145, and handed the deed, together with the certificates of the shares, to the Defendant, through his brokers, who paid to the Plaintiff £145, *Mackenzie* paying the difference, £57 10*s*.

The Defendant never objected to the transaction, but did not execute the transfer; the company stopped payment, and was ordered to be wound up, and the Defendant refused to indemnify the Plaintiff, who thereupon filed a bill to compel him to do so, which bill was dismissed by the Lord Chancellor, on the ground that the contract between the Plaintiff and Defendant was not correctly alleged in the bill, as reported (1).

The Plaintiff then filed this bill against the Defendant, stating the facts of the case, and alleging that the Defendant had accepted the Plaintiff as the vendor of the shares for £145, and praying for indemnity.

The Master of the Rolls made a decree for the Plaintiff as reported (2), where the facts are fully stated, and the Defendant appealed.

Mr. *Southgate*, Q.C., and Mr. *Bush*, for the Appellants, used the same arguments as appear in the report of the case before the Master of the Rolls.

Mr. *Townsend* (Mr. *Jessel*, Q.C., with him), for the Plaintiff, was not called upon.

LORD HATHERLEY, L.C.:—

I think, Mr. *Townsend*, that I ought not to hear you after the decision of *Coles* v. *Bristowe* (3). This case seems to me

(1) Law Rep. 3 Ch. 188. (2) Law Rep. 6 Eq. 505.
(3) Law Rep. 4 Ch. 3.

L. C. 1869 HAWKINS v MALTBY.

to be bound entirely by that decision, the only other question being one which I decided adversely to the Plaintiff in the former suit. The Lord Chancellor *Chelmsford*, on an appeal from my decision on that occasion (1), expressed his opinion very decidedly (though it was an extra-judicial opinion, inasmuch as, upon other grounds, the appeal was dismissed), that I had erred in coming to the conclusion at which I had arrived:—The Defendant, on the 27th of March, paid his money for these shares, and received the certificates, and what purported to be a transfer of the shares. A call came to his knowledge formally on the 7th of April, by the transmission on the part of the Plaintiff to the Defendant of the letter of call, but the Defendant did nothing thereupon as between him and the Plaintiff up to the 11th of May, when the company finally stopped payment. The Lord Chancellor held that it was then too late for the Defendant to maintain that he should be liberated from his contract upon the ground of his want of knowledge of that call being made. I am inclined to think, looking at those dates, that I did err in holding that the Defendant was entitled to exemption from his contract, he having so acted as to lead the Plaintiff to suppose up to the 11th of May, when the company stopped payment, that he would retain the shares, previous to which time the company might have prospered, the shares might have risen, and the Defendant might have been in a position to insist on his purchase.

The question, then, is, whether the Plaintiff could have insisted on the completion of the contract. That, since the case of *Coles* v. *Bristowe* (2), is not to be disputed.

Hawkins, the Plaintiff, sold through the medium of his own brokers, Messrs. *Crowley*, who dealt with a jobber of the name of *Mackenzie*, and the Plaintiff's brokers of course dealt with *Mackenzie* upon the footing of the *Stock Exchange* regulations, which allow the shares to pass through a number of hands up to the time at which they are to be delivered; and Messrs. *Crowley* having made this sale were bound to transfer those shares by the 30th of March to any person who might buy, also through the medium of a broker acting on the *Stock Exchange*. The Defendant employed brokers acting on the *Stock Exchange*, and the brokers of the

(1) Law Rep. 3 Ch. 188. (2) Law Rep. 4 Ch. 3.

Plaintiff and the brokers of the Defendant had to deal with these shares according to the rules of the *Stock Exchange*. Being employed as brokers, subject to those rules, it was held in the case of *Coles* v. *Bristowe* (1) that their employers were bound by the rules, the employers employing them as competent only to deal according to the regulations of the market where the dealing took place. That being so, the parties were bound. The Plaintiff was bound to deliver, and the Defendant was bound to accept, provided he could get the shares on the day stipulated. The Defendant's broker made his arrangement with the Plaintiff's broker, and the name was passed on the 27th. Everything was done, and all being done and completed, according to the case of *Coles* v. *Bristowe* the whole transaction is complete, subject to the question whether the Defendant could say, "Although I made the purchase, I find that on the very day on which the purchase was made a call was made, by which the property became depreciated in value, and I ought not to be compelled to take these shares with that call, of which I knew nothing at the time when I made the purchase." The answer to that was given by Lord *Chelmsford*, and I acquiesce in that view, and hold myself to have been erroneous as Vice-Chancellor in taking the contrary view. And I think that taking the shares as the Defendant did on the 27th of March, looking at the speculative character of the property, it was too late for him to say, "There was an objection of which I became aware on the 7th of April; but I never, between the 7th of April and the 11th of May, intimated anything whatever to the person to whom I was bound by contract; so that between the 7th of April and the 11th of May I was at liberty to deal with the shares as I thought fit, reserving in my own breast the question whether I should throw them up in case they became unprofitable." I think I was in error in holding that that was a sufficient excuse, not having paid sufficient regard to the dates to which I have referred, and the rest of the case being bound by *Coles* v. *Bristowe*, I must dismiss the appeal with costs.

Solicitors for the Plaintiffs: Messrs. *Hurford & Taylor.*
Solicitors for the Defendant: Mr. *J. Crowdy.*

(1) Law Rep. 4 Ch. 3.

L. C.
1869
Jan. 30.

GREEN *v.* WYNN.

Surety—Release by Creditors—Covenant to pay Interest—Resulting Trust for Debtor.

By a mortgage deed the debtor covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—

Held, that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor.

Semble, that under such a deed of assignment there would be a resulting trust of any surplus for the debtor.

Decree of *Giffard*, V.C., affirmed.

BY an indenture dated the 23rd of April, 1866, *T. Green* the younger mortgaged certain property for £1000, with the usual covenant by him for payment of the £1000 and interest; and the deed also contained a covenant by *T. Green* the younger, and by *T. Green* the elder (who was a surety only), that so long as the said sum of £1000, or any part thereof, remained unpaid *T. Green* the younger, or *T. Green* the elder, or one of them, would pay interest thereon at the rate of 10 per cent. per annum.

On the 31st of December, 1866, *T. Green* the younger executed a deed under the *Bankruptcy Act*, 1861, by which he assigned to a trustee all his real and personal estate on trust to sell and convert into money, and after payment of expenses to "pay and divide the clear residue of the said moneys unto and among all and singular the creditors of the said debtor, whether such creditors shall or shall not execute these presents, rateably and in like manner as if the said debtor had been on the day of the date of these presents duly adjudged bankrupt:" and by the same deed it was witnessed that the creditors did release and discharge the debtor, his heirs, executors, and administrators, "of and from all the debts due to them respectively by the debtor," and all actions, suits, &c. The deed also contained a proviso that nothing therein contained should

invalidate or affect any mortgage charge, or other specific lien or security held by any creditor of the said debtor, "or any right or remedy which any such creditor may have against any other person or persons in respect of any debt due by the said debtor, either alone or jointly with any other person or persons."

It did not appear that any interest was due to the mortgage creditor at the date of the assignment, but he brought an action for a quarter's interest due the 23rd of April, 1868, and *T. Green* the elder thereupon filed the bill in this suit to restrain the action.

The Vice-Chancellor *Giffard* dismissed the bill with costs, as reported (1), and the Plaintiff appealed.

Mr. *Druce*, Q.C. and Mr. *Caldecott*, for the Plaintiff:—

This is not merely a covenant by the creditor not to sue, but the debt has been absolutely released and is gone, and if gone the interest must be gone as against both principal and surety. The case cannot be distinguished from *Webb* v. *Hewitt* (2). In *Owen* v. *Homan* (3) Lord *Truro* expressed his disapprobation of the doctrine of releasing the debtor without releasing the surety. The surety has a right to take every advantage of the wording of the deed, and the words cannot be held expressly to reserve the remedy in a case like this where the debt was not due at the time. A surety has never been held liable to pay a debt incurred after a release. In *Price* v. *Barker* (4), *Kearsley* v. *Cole* (5), and the other cases where a surety has been held liable, there was no *cessio bonorum*. This is not an assignment in trust, but an absolute assignment to one creditor, who undertakes to divide the property amongst the others whether there is a surplus or not. Suppose there was only one creditor, could he have taken the whole property of the debtor *in specie*, whatever it might amount to, and then come upon the surety? Even if the release is to be taken as a covenant not to sue, does not that include a covenant not to sue for interest? Interest is merely a payment for forbearance of a debt, and if the debt is gone how can any interest accrue? If we have no relief in Equity the surety will be compelled to pay a perpetual annuity of £100 a year, as he has no means of re-

(1) Law Rep. 7 Eq. 28.
(2) 3 K. & J. 438.
(3) 3 Mac. & G. 378; 15 Jur. 339.
(4) 4 E. & B. 760; 1 Jur. (N.S.) 775.
(5) 16 M. & W. 128.

L. C. 1869 GREEN v. WYNN.

deeming. Even if the surety can relieve himself by paying off the principal, he is then compelled to do a thing never contemplated by the mortgage deed; moreover, the surety cannot then come in with the other creditors and prove as for a debt, and obtain a dividend, and it is not clear that he can come upon the mortgaged property: *Pledge* v. *Buss* (1).

Mr. *Kay*, Q.C., and Mr. *Whately*, for the Defendant.

LORD HATHERLEY, L.C.:—

The right reserved against the surety is any right or remedy which the creditor may have against any other person or persons in respect of any debt due by the debtor. The debt due is £1000, and the right of the creditor against the other person is, that as long as the debt remains unpaid that other person may be called upon to pay £100 a year. Then comes the release, and if the debt is extinguished by the release, of course the interest is extinguished. But the authorities say that if, on the one hand, the debtor is released, and, on the other hand, all demands against other persons are reserved, then it is inconsistent with the frame and object of the deed to hold that the release is intended to be complete and absolute, as that would make the two parts of the deed utterly inconsistent. The release cannot be construed to be absolute, because then no rights would be reserved in any case, and the Courts have therefore held that such a release is not to be construed as absolute, but only as a covenant not to sue. That being so, the remedy is gone as between the debtor and creditor, inasmuch as the creditor cannot sue the debtor; but as against all other persons the rights of the creditor are reserved. A surety for the whole debt of course would have to pay it; he is in the position of a person against whom a right is reserved on account of that debt. As against the debtor, the debt is gone, as under a covenant not to sue, yet as against any other person the debt is not gone, but is still existent.

It is true that the surety at the time of the execution of the deed owed nothing, because no interest was due upon the debt, and that he was only called upon to pay whenever interest remained

(1) Joh. 663. 5 Jur. N.S. 695

L. C.
1869
GREEN
v.
WYNN.

unpaid, but still the creditor's right is reserved, and, according to all the cases, I must hold that as to the surety the debt is not gone.

There was one argument by which I was pressed, that if this be so, the surety cannot get rid of the liability, and therefore must have to pay £100 a year for ever; but where there is a mortgage, of course any person under a liability to pay the interest would be at liberty to redeem. I entertain no doubt that the surety might call upon the debtor to pay the debt, and in default might himself pay the debt, and charge the debtor with the amount so paid. If this could not be done, it would form a strong argument for construing the deed as an absolute release of the debt. But I think that this case comes within the authorities that such a release is not absolute, and is quite distinguishable from *Webb* v. *Hewitt* (1), where a man took the whole of the assets, agreeing to pay five shillings in the pound to the creditors. This is an absolute assignment as in bankruptcy, and I have no doubt that when the creditors were satisfied, there would be a resulting trust of the surplus for the debtor. The deed in this case is merely an assignment for the benefit of the creditors, and this case cannot be distinguished from the other cases cited: the appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Harcourt & MacArthur.*
Solicitors for the Defendant: Messrs. *Birch & Ingram.*

MATTERSON *v.* ELDERFIELD.

L. C.
1869
Feb. 13.

Permanent Benefit Building Society—Mortgage—Power of Sale—Discount on future Instalments.

A member of a benefit building society obtained an advance on his shares on executing a mortgage in the form prescribed by the rules, by which he covenanted to repay the advance with interest by monthly subscriptions calculated to extend over a certain number of months. The mortgage contained a power of sale in the event of the subscriptions falling into arrear for three months, and the purchase-money was to be applied in satisfaction of all moneys then due or thereafter to become due from the mortgagor in respect of subscriptions, fines, insurance, or otherwise, under the mortgage

(1) 3 K. & J. 438.

L. C.
1869
MATTERSON
v.
ELDERFIELD.

10 Ch 46
6 App Cas 690
14 Ch D 707

deed, and the surplus to be paid to the mortgagor. The mortgagor paid a few of the subscriptions, and then fell into arrear, and the mortgaged premises were sold by the directors:—

Held (reversing the decision of *Giffard*, V.C.), that the mortgagor was not entitled to any rebate or discount upon the amount of subscriptions not due at the time of the sale, although the rules prescribed that such an allowance should be made in case of a mortgagor redeeming his mortgage before the expiration of the full period of payment.

In such a case there is no difference between a permanent society and one intended to be wound up after a definite period.

THIS was a special case stated for the opinion of the Court of Chancery in the bankruptcy of *George Osborne*.

In the month of December, 1863, the bankrupt became the holder of sixty shares in the *Minerva Permanent Benefit Building Society*.

The following were the rules of the society which were specially referred to in the argument:—

"2. The objects of this society are to raise a fund by monthly subscriptions to enable members thereof to receive out of the funds of the society the amount or value of their shares therein wherewith to erect or purchase one or more dwelling house or dwelling houses, or other real or leasehold estate, to be secured by way of mortgage to the society until the amount or value of their shares, and all fines or other expenses incurred in respect thereof, shall have been fully paid and satisfied."

"101. The shares in this society shall be divided into two classes, namely, deposit or unadvanced shares allotted to depositing members, and anticipated or advanced shares allotted to borrowing members, and shall be of the value of £20 each, to be realized by the subscriptions hereinafter specified, and to be unlimited in number."

"104. The monthly subscriptions for advance shares shall commence and be payable at the monthly subscription meeting next following that at which such shares shall have been awarded to be advanced, and shall be according to the following scale, or such other increased scale of subscriptions as the directors may from time to time determine, and such rates of subscription shall be inclusive of principal money and interest to be paid for each share advanced." Then followed a scale of payments.

"110. Members paying six months' subscriptions or money in advance upon anticipated or advanced shares shall be allowed, at the discretion of the directors, a discount on such payments at the rate of £5 per cent. per annum, or at such other rate as the directors may determine."

136. This rule prescribed the form of the mortgage security which was to be given for all moneys advanced by the society. Every mortgage was to contain a power of sale in case of default in payment of the subscriptions for three successive monthly meetings; and the trusts of the purchase-money were declared as follows:—"And the moneys to arise from such sales as aforesaid shall, in the first place, be applied to pay and satisfy all costs and expenses attending such collection of rents and profits, or such sale or sales, and the making of a title to the said premises, or on account of any insurance of the said messuages or buildings from loss by fire, or of the finishing and completion or the repairs thereof, or the ground rents or taxes charged thereon, or the obtaining possession, or enforcing the performance of any contract or contracts for the sale of the same, or of any part thereof, or otherwise incidental to the execution of the powers in such mortgage or in such rules contained; and, in the next place, in or towards satisfaction of all moneys then due, or thereafter to become due, and payable by the mortgagor in respect of subscriptions, fines, interest, insurance, or otherwise howsoever, under or by virtue of any rules or regulations of this society, or of the said security, and the residue, or surplus moneys (if any), which may be received as aforesaid, shall be paid to the mortgagor, his heirs, executors, administrators, or assigns."

"142. If any member of this society shall at any time be desirous of redeeming the mortgage security given by him for the shares advanced thereon before the expiration of the time specified in the mortgage deed, he shall be allowed to do so upon giving two months' notice thereof in writing to the directors, and paying all the instalments for subscriptions and interest then due, or which would thereafter become payable if such mortgage were not redeemed, together with all fines and other charges whatsoever due on account of such shares and security, and the fees payable on the release of a security as hereinbefore provided, and a fee of

L. C. 1869

MATTERSON v. ELDERFIELD.

6*d.* per share to the secretary, and such member shall be allowed a discount at the rate of £5 per cent., or such other rebate as the directors may determine, upon all the instalments and interest as they would have respectively become due, which he may then pay in advance on account of the shares and security so withdrawn and redeemed, and no member shall be entitled to redeem his securities upon any other terms than the above, any rule of Law or Equity notwithstanding."

The bankrupt obtained an advance of £1200 in respect of his shares, and on the 23rd of December, 1863, he executed a mortgage deed of certain freehold houses in the form prescribed by the rules. By this deed, in consideration of the sum of £1200 advanced to him, he covenanted to repay, first, the sum of 4*s.* 8*d.* per share per month for each of his said shares during a period of 120 calendar months from the 25th of November, 1863; secondly, all fines, fees, and other moneys accruing due to the society in respect of the said shares, according to the rules of the society; and thirdly, all insurance and other moneys authorized by the said rules to be paid by the society, and also to keep all the rules of the society. The indenture then contained a conveyance of the mortgaged premises to the trustees of the society and their heirs, subject to redemption by the mortgagor on his observance of all his covenants thereinbefore contained, and a power of sale in the form set out in the 136th rule, except that in the clause directing the application of the purchase-money the words were as follows: —"In the next place, in or towards satisfaction of all moneys then due, or thereafter to become due and payable by the mortgagor, his executors, administrators, and assigns, in respect of subscriptions, fines, insurance, or otherwise howsoever, under or by virtue of any rules or regulations of the society, or of the said security, and the residue," &c., no mention being made of the payment of "interest."

The bankrupt was furnished with a pass-book, in which there was entered to his debit the sum of £1200 as cash advanced, and £480 as interest thereon; the two sums of £1200 and £480 made up the sum of £1680, which was the full amount of the monthly subscriptions payable under the deed. On the same side were entered the fines, expenses, and other charges, which were also payable by the bank-

rupt, and on the credit side were entered his monthly subscriptions and other payments on account of the mortgage debt.

On the 7th of May, 1867, *Osborne* became bankrupt, and the Plaintiffs were appointed his creditors' assignees.

On the 20th of August, 1867, the subscriptions being more than three months in arrear, the premises were sold by the directors of the society, under the power of sale, for £1610, and the purchase-money was paid to the trustees of the society on the 30th of September, 1867.

The trustees retained out of the purchase-money the subscriptions then due, and the expenses of the sale, and also the sum of £1255 18*s.* 4*d.* in respect of the subscriptions subsequent to the 30th of September, 1867, under the covenant in the mortgage deed, and paid the balance, amounting to £163 18*s.* 1*d.*, to the assignees of the bankrupt.

The assignees contended that the trustees were not entitled to retain the whole amount of the future subscriptions, but were bound to allow a discount or rebate in respect of their pre-payment.

The case was heard before Vice-Chancellor *Giffard* on the 24th of November, 1868, who decided that the Plaintiffs were entitled to a rebate at the rate of £5 per cent. in respect of the monthly subscriptions subsequent to the 30th of September, 1867; and from this decision the Defendants appealed.

Mr. *Druce*, Q.C., and Mr. *Eddis*, for the Appellants:—

This is not an ordinary mortgage, but a special contract, which must be construed by the rules of the society. The directors had no power to call in the principal money advanced; the contract was not to repay the principal with interest as in an ordinary mortgage, but to pay the subscriptions as they became due. If the mortgagor fails to do this, he puts the society to risk and inconvenience, and cannot complain of their enforcing their contract. The fact that the directors are empowered to allow a rebate in the case of voluntary pre-payment raises no presumption that they ought to allow it where the shareholder is in default. According to the Plaintiffs' argument, a mortgagor who drives the society to execute the power of sale is in a better position than one who voluntarily redeems; for under the 142nd rule, in the

L. C. 1869

MATTERSON v. ELDERFIELD.

case of a mortgagor who redeems the directors determine the amount of discount, and might fix it at £2 or £3 per cent.; whereas the Plaintiffs claim for the mortgagor discount at £5 per cent. There is nothing unreasonable in the rules, which are similar to those in other building societies, and have been often acted on by the Court: *Smith* v. *Pilkington* (1); *Mosley* v. *Baker* (2); *Parker* v. *Butcher* (3).

Mr. *Kay*, Q.C., and Mr. *Chitty*, for the Plaintiffs:—

The instalments which the Defendants claim are composed partly of interest, and the simple question is, whether they are entitled to retain interest which has never accrued. The calculation of the instalments was made on the supposition that the payments would be postponed; it is unreasonable that the same sum should be paid when the money is paid at once. The 110th and 142nd rules, which relate to voluntary pre-payments, refer in terms to the interest which was payable, and the directors have, therefore, power to allow a rebate or discount in respect of it. But the trusts of the purchase-money under this power of sale make no mention of interest; it would therefore appear that it was not intended that any interest should be retained in this case. It is also to be observed that the word used is "satisfaction," which is rightly applied to a transaction wherein a reduced payment is made in place of a debt due *in futuro*. With respect to the rate of discount to be allowed, the rules mention £5 per cent., and until the directors fix another rate, that rate is binding.

If the mortgagor had offered to redeem he would have been entitled to a discount; but the directors contend that, as he has been in default, he is to forfeit the discount. Their claim, therefore, is in the nature of a penalty, against which the Court will always relieve: *Fleming* v. *Self* (4); *Thompson* v. *Hudson* (5). There is nothing to prevent the mortgagor from now claiming his right to redeem; or if not, the directors ought to invest the money in the funds to satisfy the unpaid instalments, and pay us the interest in the meantime.

(1) 1 D. F. & J. 120.
(2) 6 Hare, 87.
(3) Law Rep. 3 Eq. 762.
(4) 3 D. M. & G. 997.
(5) Law Rep. 2 Ch. 255.

The society is a permanent one, and therefore differs from the societies whose rules have been in question in other cases; for in them the scheme of payments was so framed as to form a fund to be divided after a limited period; in which case a pre-payment would interfere with the general scheme.

Mr. *Druce*, in reply.

LORD HATHERLEY, L.C.:—

The question in this case turns upon the construction of three of the rules of the society. First, we have the 110th, which refers to the case of a member being disposed to pay six months subscription in advance, and it provides that "he shall be allowed, at the discretion of the directors, a discount on such payments at the rate of £5 per cent. per annum, or at such other rate as the directors may determine."

It seems to me plain, that if this rule stood alone it would be a matter simply of bargain; no doubt the directors would not be allowed to act vexatiously, and any member would have reason to complain if he were refused a discount unreasonably; but still the directors have an independent discretion, and it is no objection to that view that they are obliged to exercise that discretion in a reasonable manner.

The language of the 142nd rule is rather different. It provides that if any member shall be desirous to redeem his mortgage, "he shall be allowed a discount at the rate of £5 per cent., or such other rebate as the directors may determine, upon all the instalments for subscriptions and interest as they would have respectively become due." Here there is no mention of a discretion in the directors; they must allow him some rebate, although they have power to determine the amount, and there can be no doubt this Court would restrain them from exercising that power vexatiously.

But when we come to the 136th rule relating to a compulsory sale of mortgaged property, the wording is entirely different. [His Lordship read the provision respecting the power of sale in the mortgage securities.] Therefore, where there is a compulsory sale in default of payment of the instalments, the money is all to be paid at once, as in the case of redemption, under

L. C. 1869 MATTERSON v. ELDERFIELD.

the 142nd rule; but there is this difference, that in the case of redemption the mortgagor has a rebate allowed, but in the other case he is to pay in the same way, but there is nothing about an allowance of a rebate or discount, and the directors would not be at liberty to make any. There is no power given them to do so.

It is said that the word "interest" does not occur in the power of sale in the mortgage in question. I do not think that is material. I think the true explanation of the transaction is, that the borrower has the advantage of making the repayment by fixed instalments instead of at one time. In calculating what is due they charge him in his pass-book with principal and interest, and split the whole sum so charged into monthly instalments. The mortgagor borrows on these terms. The directors could not call in the £1200; they must wait for the instalments becoming due.

I think there is no substantial difference in a question of this kind between a society like this which is permanent and one which is intended to last a limited period. There is a class of members who do not desire advances, and they make a compact that the advanced members are to have certain benefits, and the non-advanced members certain benefits, and we must look at the whole instrument as fixing the contract between the parties. The non-advanced members say: "We do not stipulate to have the principal back as principal, but we will pay ourselves in this way. If you have a mortgage you must either pay the advances off by instalments; or, secondly, if you redeem, you must pay all future instalments down, and we will allow a rebate; or, thirdly, if you put upon the society the risk of selling the property, which may be difficult from the nature of the security, then we will pay ourselves the future instalments at once, as we do in case of redemption, but we will only pay you the surplus and will allow you no rebate." It is not then a penalty, it is a contract. It is true that the right to sell prevents the right of redemption. So far it is a forfeiture, but not otherwise. If the mortgagor had redeemed, he would have had an abatement, as he has not done so he can have no such benefit. It is clear from the authorities cited that the rules of this society are not unusual, and we must be bound by their literal meaning. Not finding anything in them to shew that the directors are authorized to make any rebate, I must

reverse the decision of the Vice-Chancellor, and answer the question in this case in the negative.

L. C. 1869 MATTERSON v. ELDERFIELD.

Solicitors for the Plaintiffs: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitor for the Defendants; Mr. *T. Royle.*

In re SOUTH ESSEX ESTUARY AND RECLAMATION COMPANY. *Ex parte* PAINE AND LAYTON.

L. C. 1869 *Feb.* 19, 2

Winding-up—Production of Documents—Lien.

Under 25 & 26 Vict. c. 89, s. 115, the solicitors of a company may be compelled, on a summons obtained by the official liquidator in the winding up of a company, to produce documents relating to the company, without prejudice to their lien for costs.

THE Appellants in this case, Messrs. *Paine & Layton,* had succeeded to the business of the former solicitors to the *South Essex Estuary and Reclamation Company,* and held many papers belonging to that company, on which they had a lien for costs. The company had been ordered to be wound up; and by a summons made in the matter of the *Companies Act,* 1862, and in the matter of the company, the Appellants had been summoned to attend at the Chambers of the Vice-Chancellor *Malins* to be examined on the part of the official liquidator, and had been required to bring with them the parliamentary subscription contract of the company, and all other documents in their possession relating to the company.

Messrs. *Paine & Layton* attended, but refused to produce the documents, on the ground that they had a lien on them for costs. The Vice-Chancellor *Malins,* before whom the matter came upon adjourned summons, ordered the production.

Messrs. *Paine & Layton* now moved by way of appeal to discharge that order.

Mr. *Fischer,* in support of the motion:—

The Vice-Chancellor seemed to consider that the official liquidator was an officer of the Court, and as such entitled to production

L. C. 1869 — *In re* South Essex Estuary and Reclamation Company. — *Ex parte* Paine and Layton.

of documents wanted for the purpose of the winding-up; but he is not more an officer of the Court than a solicitor is. The order for production was made under the *Companies Act*, 1862, s. 115; but that only gives a discretion to the Court to order production. Section 63 of the Act of 1848 was very similar, and *Potter's Case* (1) was decided upon it; and also *In re Camerons Coalbrook, &c., Railway Company* (2); *Hope* v. *Liddell* (3).

A solicitor cannot be ordered to produce a document under an ordinary *subpœna duces tecum*: *Kemp* v. *King* (4); *Doe* v. *Ross* (5). The official liquidator is like the assignees in bankruptcy, against whom lien will prevail: *Lambert* v. *Buckmaster* (6).

Mr. *Cotton*, Q.C., and Mr. *Sturges*, for the official liquidator:—

The 115th section compels the solicitor to produce the documents for the information of the Court, leaving his lien uninjured. The official liquidator is concerned for the creditors as well as the shareholders, and does not occupy the position of the company as client to the solicitors. This makes the distinction between winding-up and bankruptcy. Of course the lien remains, notwithstanding the winding-up; but the question is, whether these documents must not be produced in evidence: *Simmonds* v. *Great Eastern Railway Company* (7); *Lockett* v. *Cary* (8).

Mr. *Fischer*, in reply.

Lord Hatherley, L.C., said that no doubt under the old Winding-up Acts, a solicitor would not, on the application of the official manager, have been ordered to produce any documents belonging to the company upon which he claimed a lien, because it was then simply the case of a client asking production against his solicitor without having paid the solicitor's bill. But it was equally beyond doubt that the solicitor would have been ordered to produce them on a *subpœna duces tecum* obtained by a creditor or third party. Though it did seem a strong measure for the Legislature to have passed, His Lordship thought that the Vice-

(1) 13 Jur. 691; 1 De G. & Sm. 728.
(2) 25 Beav. 1.
(3) 7 D. M. & G. 331. 1 Jur. N.S. 665
(4) 2 Moo. & Rob. 437.
(5) 7 M. & W. 102.
(6) 2 B. & C. 616.
(7) Law Rep. 3 Ch. 797.
(8) 3 N. R. 405.

Chancellor had come to a right conclusion upon the Act of 1862. It was true that the Act left a discretion on the part of the Judge; but it was a judicial discretion to be exercised according to the facts of the case, as there might be special grounds for non-production.

By considering the difference between this Act and the older Acts the object of the Legislature appeared clearly. The former Acts did not interfere directly with the rights of creditors, who were allowed to go on with their actions until they were stayed by the Court, but by the last Act the rights of creditors were largely interfered with, they were prevented from suing, and were compelled to come in under the winding-up. The official liquidator had therefore now to act for the benefit of the creditors as well as of the shareholders, and therefore the Legislature might well have considered it right to give him this power. His Lordship could not, in fact, read the section in any way except as saying that production might be ordered, but must be without prejudice to any lien; though in many instances, of course, this would render the lien valueless. The solicitors in this case were persons capable of giving information within the 115th section, and production must be ordered, but the Court would be very careful not to go beyond the powers conferred by the section.

The order of the Vice-Chancellor would be affirmed, and this motion refused, but without costs.

Solicitors: The Appellants in person; Messrs. *Western & Sons.*

L. JJ.
1869
Jan. 19, 20, 30.

KEATES *v.* LYON.

Restrictive Covenants—Assigns—Covenants running with the Land.

A. sold part of an estate to *B.*, who entered into restrictive covenants for himself, his heirs and assigns, with *A.*, his heirs, executors, and administrators, as to buildings on the purchased property; but *A.* did not enter into any covenants as to the land retained. After this *A.* sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by *B.* After this *A.* bought back from *B.* what he had sold to him:—

Held (affirming the decision of the Court of Chancery of the Duchy of *Lancaster*), that the benefit of *B.*'s covenants did not in equity pass to the subsequent purchasers of other parts of the estate from *A.*, and that *A.*, after the re-purchase, could make a title to the re-purchased land discharged from the covenants.

Child v. *Douglas* (1) considered.

THE question in this appeal was, whether the Appellant, a purchaser, would be bound in equity by certain restrictive covenants contained in a former conveyance of the property.

By indenture, dated the 27th of August, 1841, *Anne Sewell*, in consideration of £14,000, conveyed to *William Sharp*, in fee, a dwelling-house called *Brooklands*, with the offices and gardens and several closes of land, containing in all about twenty-eight and a half acres, subject to a covenant on the part of *Sharp* not at any time to erect, set up, or carry on, or permit to be erected, set up, or carried on, upon any part of the lands so conveyed, any nuisance, annoyance, or other offensive matter or thing, except the making of bricks.

By indenture, dated the 2nd of November, 1842, *Sharp*, for a valuable consideration, conveyed to *Langton*, in fee, two pieces of land, separately described, being portions of the lands comprised in the indenture of the 27th of August, 1841, and containing together 9952 square yards, with the right of using certain roads recently formed in and over those lands, and the conveyance contained a covenant by *Sharp* to finish and complete the several roads and ways which led to and adjoined the two pieces of land.

(1) Kay, 560.

and also the several sewers, gutters, and drains which were to run under and through the several roads.

The conveyance also contained covenants by *Langton*, "for himself, his heirs, and assigns," with *Sharp*, "his heirs, executors, and administrators," to the effect that the piece of land firstly described in the conveyance should be divided into five lots of not less than 1400 square yards each—that on each lot only a single or double villa, with offices, and of an annual value of not less than £50 for each house, should be built—that the villas should be of a particular construction as to height, and that the offices should only be placed in a certain position—that on the piece of land secondly described only a single or double villa of the same value and of the same construction should be built, with a similar stipulation as to the position of offices—that the enclosing walls or fences of both pieces of land should be of certain dimensions and form—that no nuisance or noisome trade should be permitted on the premises; and, finally, that *Langton*, his heirs or assigns, would always defray a moiety of the expense of keeping the roads and sewers therein mentioned in repair, so far as they were co-extensive with the pieces of land conveyed.

By another deed, dated the 19th of November, 1842, *Sharp* conveyed to *Langton*, in fee, another piece of land, containing 6665 square yards, adjacent to the former pieces, and also forming part of the lands comprised in the deed of the 27th of August, 1841; and the conveyance contained restrictive covenants by *Langton* similar to, though not identical with, those contained in the deed of the 2nd of November, 1842.

Both these conveyances contained covenants by *Sharp* for the production of certain title deeds, among which was mentioned the deed of the 27th of August, 1841.

In the interval between the date of the first conveyance to *Langton*, viz., the 2nd of November, 1842, and the date of the re-conveyance by *Langton* presently referred to, *Sharp* sold and conveyed to different persons various other portions of the lands comprised in the conveyance of the 27th of August, 1841, and notices of the several conveyances were indorsed on that deed. It did not appear whether they contained any covenant by the purchasers, nor was there any evidence that the purchasers

L. JJ. 1869 KEATES v. LYON.

were informed of the restrictive covenants entered into by *Langton*.

By indenture, dated the 20th of February, 1846, and made between *Langton* of the first part, *Thomas Harvey* (who was a dower trustee for *Langton*) of the second part, *Sharp* of the third part, and *John Lyon* and *James Ryder* of the fourth part, after reciting that *Sharp* had agreed to re-purchase from *Langton*, for £5000, the three pieces of land comprised in the two conveyances to *Langton*, and that *Lyon* and *Ryder* had agreed to advance and pay the purchase-money to *Langton*, *Langton* and his trustee, in consideration thereof, and by the direction of *Sharp*, conveyed the three pieces of land to *Lyon* and *Ryder*, in fee, to be held by them upon the trusts of an indenture dated the 19th of February, 1846, and made between *Sharp* of the one part, and *Lyon* and *Ryder* of the other part, being a mortgage to secure various sums of money, including the £5000 paid to *Langton*. The trusts of this mortgage deed were the ordinary trusts for sale of the mortgage premises and repayment of the moneys advanced, with powers of leasing and management, and it contained a declaration that the money advanced belonged to *Lyon* and *Ryder* on a joint account.

On the 29th of September, 1853, *Lyon* and *Ryder* filed a foreclosure claim in the Court of the County Palatine against the assignees in bankruptcy of *Sharp*, and certain puisne incumbrancers, and by an order made in that suit, and dated the 23rd of October, 1853, the Defendants were absolutely foreclosed. By a deed, dated the 22nd of April, 1863, *Ryder* (who survived *Lyon*) conveyed the premises comprised in the mortgage deed (except such parts as had been sold by him to *Lyon*) to the use of himself and *Joseph Andrew Keates* and *Joseph Lyon*, their heirs and assigns. *Lyon* and *Ryder*, the original mortgagees, were, it appeared, the trustees of the will of *Joseph Lyon*, and as such trustees advanced the money secured by the mortgage; and the last-mentioned deed was a transfer to two new trustees, together with the continuing trustee of the same will. The present suit was instituted in the Chancery Court of the County of *Lancaster* by *Keates* and *Joseph Lyon* as surviving trustees, for the administration of the estate of the testator, *Joseph Lyon*; and an order in the suit, dated the 14th of May, 1868, was made, by which a sale of the above

three pieces of land was directed. Accordingly the property was put up for sale by auction in lots, under conditions of sale which referred to the restrictive covenant contained in the deed of the 27th of August, 1841, but not to those contained in the deed of the 2nd November, 1842. The Appellant purchased some of the lots, and took the objections that the land was still subject to the latter covenants, and that a good title therefore could not be made. The District Registrar of the Court certified that a good title to the lots in question could be made, and the Vice-Chancellor of the Duchy of *Lancaster*, by the order under appeal, confirmed that certificate.

Mr. *Little*, Q.C., and Mr. *Robinson*, for the Appellant:—

We contend that every subsequent purchaser from *Sharp* was an assignee of the benefit of *Langton's* covenants. *Sharp*, therefore, could not alone release the land from them by his re-purchase: *Whatman* v. *Gibson* (1); *Mann* v. *Stephens* (2); *Coles* v. *Sims* (3); *Child* v. *Douglas* (4); *Western* v. *MacDermott* (5); *Tulk* v. *Moxhay* (6).

Mr. *Charles Hall*, and Mr. *North*, for the Respondent:—

Sharp was bound to let *Langton* use the roads; but subject to this he was absolute owner of the retained property, and could build upon it as he pleased. The benefit of *Langton's* covenant cannot be held to pass to the purchasers from *Sharp* in the absence of any agreement or expression of intention to that effect. In *Whatman* v. *Gibson* there were mutual covenants between all parties. In *Western* v. *MacDermot* there was a general building plan, and the covenants were evidently entered into with the vendor for the purpose of benefiting all the purchasers. Here there is no proof of a general plan, and it is not shewn that *Sharp's* purchasers, other than *Langton*, entered into any covenant at all. This distinguishes the case from *Child* v. *Douglas*, in which, moreover, the bill was dismissed.

Mr. *Little*, in reply.

(1) 9 Sim. 196.
(2) 15 Ibid. 377.
(3) Kay, 56. 16 Jur 683
(4) Kay, 560; 5 D. M. & G. 739; 2 Jur. (N.S.) 950.
(5) Law Rep. 1 Eq. 499; 2 Ch. 72.
(6) 2 Ph. 774. 12 Jur 453 36, 35 Beav 243.

L. JJ. 1869 KEATES v. LYON.

Jan. 30. SIR C. J. SELWYN, L.J.:—

The judgment which I am about to deliver is the judgment of the Court.

[His Lordship then stated the facts as above, and continued:—]

In support of the objection it has been contended that the benefit of the restrictive covenants contained in the conveyance to *Langton* was a benefit reserved by *Sharp* in respect of the unsold portion of the property comprised in the deed of the 27th of August, 1841, and that it was so attached to the land that it passed by his subsequent conveyances of other portions of the same property to other purchasers, and, consequently, that although (as was admitted) as between *Sharp* and *Langton*, those covenants were effectually put an end to by the deed of the 20th of February, 1846, no arrangement between *Sharp* and *Langton* could deprive the purchasers between the dates of the conveyances to and reconveyance from *Langton* of the benefit which they had obtained, or of their right to enforce the covenants, and, consequently, that a title to the lots in question, unfettered by the covenants, could not be made without the concurrence of the intermediate purchasers.

The general principles upon which the Court deals with cases relating to the burden and incidence of covenants and stipulations restrictive of the free use of land, may be gathered from the observations of Lord *Cottenham* in the case of *Tulk* v. *Moxhay* (1), where he says: "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it—that the latter shall either use or abstain from using the land purchased in a particular way—is what I never knew disputed. . . . It is said that the covenant being one which does not run with the land this Court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price will be affected by the covenant." And again he says: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this Court would enforce it against a party purchasing with notice of it, for

(1) 2 Ph. 774, 777.

if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical distinctions depending upon the covenants running or not running with the land. Thus in *Whatman* v. *Gibson* (1), where the owner of a particular piece of land on which a row of houses was intended to be built, executed a deed reciting that it had been laid out, and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of that land, that the several proprietors for the time being should observe and abide by the several stipulations and restrictions therein contained, and that he himself would at all times observe the like restrictions and stipulations; and those restrictions and stipulations were also enforced by mutual covenants, although the question afterwards arose between subsequent purchasers of different portions of this piece of land, it was held that the one was bound by, and the other was entitled to enforce, the covenants, for as the Vice-Chancellor of *England* observed (2): "It is quite clear that all the parties who executed this deed were bound by it, and the only question is, whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the deed, are not bound by it? I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row."

And in *Coles* v. *Sims* (3), which was also a case of mutual covenants relating to a particular piece of land laid out in plots for the erection of a row of houses to be built in a particular and uniform manner, the present Lord Chancellor, then Vice-Chancellor, after quoting the passage to which we have just referred in the judgment in *Whatman* v. *Gibson*, says (4): "Therefore taking the

(1) 9 Sim. 196.
(2) Ibid. 207.
(3) Kay, 56; 1 of Jur 603 NS
(4) Ibid. 69.

L. JJ. 1869 KEATES v. LYON.

deed between *Jones* and *Shewell* alone, these two parties having clearly agreed with each other that the property should be laid out in a particular way, all those who come in under them are bound in equity by their covenants if they had notice of them." Again, in the case of *Western* v. *MacDermott* (1), certain pieces of land in the city of *Bath*, including the sites of certain houses called *Brock Street*, were included in a deed of conveyance dated the 20th of December, 1766, by which, in consideration of a perpetual rent-charge reserved to himself, Sir *Renet Garrard*, the owner of the property, conveyed it to *John Wood* in fee, and *Wood* thereby covenanted to pay the rent-charge, and within ten years to build houses upon the piece of land thereby conveyed according to the plan thereto annexed; and Sir *Renet Garrard* entered into certain restrictive covenants relating to certain portions of land defined in the deed, and it was provided that every conveyance of any house to be so built should contain covenants similar to those contained in that deed; and the conveyances by *Wood*, under which the Plaintiff and Defendant derived their title, and to all of which Sir *Renet Garrard* was a party, did, in fact, contain such covenants, and also covenants by the purchasers with Sir *Renet Garrard* and *Wood*, and each of them, and each of their heirs and assigns, against building upon the gardens of the houses beyond a certain height; and the Lord Chancellor, Lord *Chelmsford*, considered himself to be relieved from the necessity of considering the question, whether the covenant against building beyond a certain height did or did not run with the land, because it was admitted on the part of the Defendant that he having purchased his house with notice of the restrictive obligation attached to it, a Court of Equity would interfere to prevent his violation of it. "This, indeed," he adds, "could not be disputed after the cases of *Tulk* v. *Moxhay* (2) and *Coles* v. *Sims* (3)." These cases were (with the exception of *Mann* v. *Stephens* (4) and *Child* v. *Douglas* (5), to which we shall presently refer) the only cases cited in support of the Appellant's contention, and in all of them the judgment of the Court is based upon clear evidence of intention and contract, supported by mutual

12 Jur. N.S. 366; 35 Beav. 243.

(1) Law Rep. 1 Eq. 499; 2 Ch. 72.
(2) 2 Ph. 774.
(3) Kay, 56; 12 Jur. N.S. 792
(4) 15 Sim. 377.
(5) Kay, 560.

covenants, and relating to a particular and defined portion of land agreed to be laid out and dealt with according to a prescribed plan.

The case of *Mann* v. *Stephens* (1) differs from those we have been discussing, in the particular that there was no general building scheme or plan affecting the property in respect of which the question to be decided arose, but in that case the owner in fee of three houses, and of an adjoining piece of land, sold one of the houses, and at the same time covenanted with the purchaser that the piece of land should be for ever thereafter used in a particular way, and that no building, except a private house or ornamental cottage, should be erected thereon, and afterwards sold the piece of land to another person, and caused the purchaser to enter into a similar covenant with him as to the user of the land. The house ultimately became vested in the Plaintiff, and the piece of land in the Defendant, who had actual notice of the covenant entered into by his predecessor in title, but who, notwithstanding, began to build a beershop and brewery on part of the land. The Plaintiff applied for an injunction to restrain this breach of the covenant, and though it was argued on behalf of the Defendant that there was no privity between the Plaintiff and Defendant, and that the burden of the covenant did not run with the land, the Vice-Chancellor of *England* granted the injunction on the ground that the Defendant had purchased with notice of the covenant; and on an appeal from an order to commit the Defendant for breach of the injunction, the Lord Chancellor held that the injunction was properly granted, though he varied it by omitting some words taken from the covenant as being too indefinite. In *Mann* v. *Stephens* the covenant respecting the user of the land was contained in the deed by which the house was conveyed, and was, therefore, plainly intended to benefit the owner of the house for the time being, and the decision was based on the ground that the restriction upon the user of the piece of land in question was known to the Defendant at the time of his contract for the purchase.

In the case now before us it is not shewn that the vendor *Sharp* had made any representations, or was bound by any contract or covenant excepting those covenants against nuisances contained

(1) 15 Sim. 377.

L. JJ. 1869 KEATES v. LYON.

in the deed of 1841, and those relating to the roads; and it is clear that at and immediately after the date of the conveyance to *Langton* in November, 1842, he was perfectly at liberty to deal with the rest of his estate as he might think fit, subject only to the covenants to which we have just alluded, and that he was also at liberty to enter into any arrangement with *Langton* by which the restrictive covenants affecting the land conveyed to him might be altered or put an end to, and the question which we have to decide is, whether he must be taken to have deprived himself of this power merely by reason of his having sold and conveyed to purchasers certain portions of his remaining property. It is true that in such cases the Court does not require any particular form of deed or covenant, but, as Lord *Cottenham* has observed, would enforce a contract if proved by a mere agreement; but, so far as the question may turn upon the intention of *Sharp*, the vendor, it is not altogether immaterial to observe, that although in both the conveyances to *Langton* in November, 1842, *Langton* is made to covenant for himself, his heirs, and assigns, the covenant in both cases is entered into with *Sharp*, his heirs, executors, and administrators only.

The case of the Appellants is not, in our judgment, strengthened by the circumstance that notices of several of these intermediate conveyances by *Sharp* are indorsed upon the deed of the 27th of August, 1841; for as these conveyances extend only to small portions of the property, and as the title deeds were retained by the vendor, it was only an ordinary and proper precaution on the part of the purchasers (who appear in several instances to have taken covenants to produce) to stipulate that notice of the fact of part of the property having been sold or conveyed should be indorsed on one of the principal title deeds so retained. There is no trace of any such contract or arrangement as that which existed in all the cases to which we have been referred; nor has any attempt been made to explain or define the limits within which the benefit of the restrictive covenants is supposed to have been confined, nor whether it must be taken to be confined to lands held under the same title or of the same tenure, or whether it would extend to lands subsequently acquired by the vendor, and be so attached to them as to pass under a conveyance of any part of such subse-

quently acquired lands, nor whether, if the covenants had been affirmative, any, and which, of the intermediate purchasers could have enforced the specific performance of such covenants. The only attempt at such a definition was made by the Appellants' counsel when relying upon a particular passage of the judgment in *Child* v. *Douglas*. They argued (1) that the Court invariably regards stipulations of this kind with reference to the benefit of the property which is reserved by the vendor, and consequently that they are attached to such reserved property, and therefore pass by every conveyance of any part of that property. But it is obvious that such a definition does not meet all cases; for cases might be put in which a vendor might lawfully and reasonably insist upon such covenants even when the conveyance comprised the whole of the property to which he was entitled at the date of the covenant, as in the case of the purchase and sale of a strip of land adjoining a large park by a person who had at the time no interest in the park, but who hoped to inherit or purchase it. Assuming the vendor of the strip of land afterwards to purchase or inherit the park, and to sue the purchaser for breach of the covenant, the purchaser of the strip of land would, in a Court of Equity, be unable to justify a violation of the covenant by reason of the injury sustained by the vendor having arisen only in consequence of his subsequent acquisition of the park.

We think that an owner of land in the position in which *Sharp* stood in the year 1842, cannot be presumed to have intended to fetter himself in the exercise of the power which he indisputably possessed of dealing with the whole of his estate as he thought fit; and as, notwithstanding the sale of some portions of land, his power of dealing with what he retained remained unaffected, it is, under the circumstances of this case, very difficult to see how any distinction is to be drawn between his power of dealing with the land so retained and with that which he resumed by the repurchase from *Langton*; and if it were to be held that a mere conveyance of a small portion of the remaining land amounts to evidence of such an intention on the part of the vendor, the rule cannot be confined to conveyances in fee, but must be extended to alienation for lives and years; and the present case affords a

(1) Kay, 568.

L. JJ. 1869 KEATES v. LYON.

remarkable instance of the inconvenience which would result from such a rule, for as there appear to have been some twenty conveyances of small pieces of land between the 2nd of November, 1842, and 1846, the concurrence of all these purchasers, and of all persons claiming under them, would be necessary to any such arrangement as that which was effected in 1846; and as it would be extremely difficult, if not impossible, to obtain the concurrence of all those persons, the practical result would be to render a portion of the property inalienable excepting under very onerous and depreciating conditions.

11 Eq 349.

The Appellant has mainly relied upon the case of *Child* v. *Douglas* (1); and it has been said that that case goes further than any of the other decided cases, and has established such a rule as that to which we have alluded; but it must be observed that in *Child* v. *Douglas* the land had been laid out for building purposes; and in the contract entered into between the vendors and the Defendant *Douglas* was contained a stipulation that *Douglas* should not erect any buildings within six feet of certain projected roads. The Plaintiff *Child* was a subsequent purchaser of another and neighbouring portion of the land so laid out, and on the occasion of his purchase he had been required to enter into, and had entered into, a covenant not to erect any building within six feet of one of the same roads called "*Houghton Place*;" and it appeared that upon the negotiation of the Plaintiffs' purchase his agent was informed, in reply to inquiries as to the conditions on which the land was to be sold, that the purchasers would not be permitted to build nearer than six feet to *Houghton Place*, and a plan of the land was shewn to him on which a building line was drawn, which indicated that the buildings were to be six feet distant from the causeway of that street. The Vice-Chancellor granted an injunction upon an interlocutory application to restrain the building of a wall fifteen feet high, but his order was discharged by the Lords Justices on appeal; and in delivering judgment, Lord Justice *Knight Bruce* said his opinion was adverse to the case of the Plaintiff upon three of the four questions involved in the cause; and one of these questions was, whether if there was such a covenant or contract not to build (as mentioned in the case), which was binding on the Defendant, the

(1) Kay, 560.

Plaintiff was a person who was entitled to sue upon it or enforce it. The motion was directed to stand over till the hearing, and the Defendant was put under an undertaking not in the meantime to carry the wall higher than fifteen feet six inches, and to abide by any order the Court might make as to his removing what he had or should have built. The cause afterwards came on to be heard before the Vice-Chancellor, and it is reported (1), when the bill was dismissed; and in delivering judgment His Honour said that he entertained no doubt that there was no intention to vary the original contract, or that there was, in fact, a breach of the contract. But he says that a main question was as to the right of the Plaintiff to sue, and this is the question upon which his doubts arose, and he said: "There would be no doubt but that this Court would interfere in a proper case without noticing the difficulty whether in point of legal form the party could sue at law or not. In *Mann* v. *Stephens* (2) the whole case was brought before the Vice-Chancellor, but it was not put upon the question of the covenant running with the land or not, but on the question whether or not there was a substantial agreement between the parties." And the Vice-Chancellor concluded his judgment by saying: "I have not been able to come to a conclusion perfectly satisfactory to my own mind what are the rights of parties *inter se* each of whom has covenanted with the landlord, but who have neither covenanted with each other nor taken any covenant from the landlord to themselves; and I have felt additional doubt from the different view taken by the Court above, and shewn so distinctly by the Lords Justices, allowing the Defendant to complete the wall, when almost the only question before me is, whether I shall order that wall to be pulled down or dismiss the bill. It does not appear to me that I ought to interfere so far in a case where I still hesitate, and where so much hesitation has been shewn in the Court above; and I must suffer what has taken place to turn the balance (for that is all that is required) in the Defendant's favour, having great doubt both as to the law and as to the application of it."

Having regard to the circumstances to which we have already alluded as existing in the case of *Child* v. *Douglas* (3), and which

(1) 2 Jur. (N.S.) 950, 952. (2) 15 Sim. 377

(3) Kay, 560.

L. JJ. 1869 KEATES v. LYON.

are not to be found in the present case, to the reversal of the order made upon the motion, and to the final dismissal of the bill by the Vice-Chancellor notwithstanding the undertaking given by the Defendant, and to the judgments delivered on those occasions, we think that that case cannot be considered as having established any such new or general rule as that which has been contended for by the Appellant, and we think such a rule is unsupported either by principle or authority, and would greatly interfere with the free alienation of landed estates.

We think, therefore, that the Appellant's objection to the title fails, and the appeal motion must be refused with costs.

Solicitors: Messrs. *Norris & Allen*; Mr. *J. H. Lydall.*

L. JJ. 1869 Jan. 26, 27.

BEIOLEY *v.* CARTER.

Settled Estates Act (19 & 20 *Vict. c.* 120), *ss.* 17, 28—*Consent to Application for Sale — Contingent Remainderman — Specific Performance — Vendor and Purchaser—Doubtful Title—Condition of Sale.*

8 Eq 572-3
10 Eq 216.
6 Ch 132
7 Ch 9
15 Eq 181. 193
16 Eq 632-3-4.
20 Eq 182
12 Cl D. 135.
18 Ch D 388

The persons whose consent is required by the 17th section of the *Settled Estates Act* to an application for a sale are persons whose consents are capable of being obtained. Therefore, where a freehold estate was limited in trust for *A.* for life, with remainder (subject to a general power of appointment by *A.*) in trust "for the person whom *A.* should leave her heir-at-law" in fee:—

Held (reversing the decision of the Master of the Rolls), that an order for sale made on the application of *A.*, with the concurrence of the trustee of the settlement, was not invalid by reason of the non-concurrence of the unascertained contingent remainderman.

What constitutes a settled estate within the Act, considered.

Observations upon the effect of the 28th section in curing an informality in a sale made in pursuance of the Act.

In a suit for specific performance, a purchaser will be forced to take a title which appears to the Court of Appeal to be good, although the Judge of the Court below was of a different opinion; that fact not being sufficient to constitute a doubtful title.

A condition of sale which did not fairly state the objection to the title against which it was directed:—

Held not to be binding on a purchaser.

THIS was an appeal from a decree of the Master of the Rolls. The bill was filed by a vendor for specific performance under the following circumstances:—

By a settlement made in 1837, in contemplation of the marriage of *W. B. Heighton* and *Mary Louisa Green*, freehold land, of which *M. L. Green* was seised in fee simple, was conveyed to the use of a trustee in fee upon trust, during the joint lives of *W. B. Heighton* and *M. L. Green*, for her separate use, without power of anticipation, and after her death, if she should die in the lifetime of her husband, in trust for such persons as she should by will appoint, and in default of such appointment "in trust for the person or persons whom she should leave her heir or co-heirs at law, and the heirs and assigns of such person or persons respectively," but in case she should survive her husband, then in trust for such persons as she should after her husband's death by deed or will appoint, and in default of appointment upon the same trusts as were thereinbefore declared in the event of her dying in the lifetime of her husband without making any appointment by will.

In July, 1858, Mrs. *Heighton*, by her next friend, presented a Petition for a sale of the property under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120). The Petition was served on her husband and children and the trustee of the settlement, and an order for sale was made. The property was put up for sale under the order, and *William Thirtle* became the purchaser for £410, but he refused to complete, on the ground that the Act did not empower the Court to make an order which would bind the heir of Mrs. *Heighton*.

Mr. *Reynolds*, the solicitor acting for the Petitioner, prevailed on the Plaintiff, who was a friend of his, to become the purchaser in the place of *Thirtle*. Accordingly, by an order of the 1st of July, 1861, *Thirtle* was discharged from his purchase, and the Plaintiff was substituted as purchaser. The costs, which were taxed at £41, were ordered to be paid out of the purchase-money, and the rest was paid into Court. On the 20th of January, 1862, the property was conveyed to the Plaintiff by the trustee, in pursuance of the order. On the occasion of the substitution of the Plaintiff as purchaser, *Reynolds* wrote a letter to him dated the 11th of January, 1862, undertaking to indemnify him from all costs, charges, and expenses in connection with the purchase; and on the 10th of June, 1862, *Reynolds* gave him a bill of sale of certain furniture

L. JJ. 1869 BEIOLEY v. CARTER.

and effects, the consideration of which was stated to be the payment by the Plaintiff of the purchase-money and costs under the order of the 1st of July, 1861.

On the 4th of October, 1866, the property was put up to auction by the Plaintiff, and purchased by the Defendant under conditions of sale, the 6th of which was as follows:—

"By indenture of settlement of the 13th day of September, 1837, executed on the marriage of *William Bright Heighton* and *Mary Louisa* his wife, the property was settled upon certain trusts for her benefit. The vendor purchased the property under orders of sale made (on the Petition of the said *Mary Louisa Heighton*) under the provisions of the Act to facilitate leases and sales of settled estates, and the property was conveyed to the vendor by indenture of the 20th day of January, 1862, which deed was settled and approved by the Judge, as appears by the certificate of his Chief Clerk written thereon. The conveyance recites the settlement of 1837, and the orders for sale, and payment of the purchase-money, and contains a qualified covenant by the trustee of the settlement for its production. The title to the property shall commence, without inquiry into, or objection to, earlier or other title, with the said indenture of conveyance, but without prejudice to the last stipulation the purchaser, if he so desire, shall be entitled to ask for an inspection of the settlement of 1837 (at his own expense) under the covenant for production above referred to."

On the 18th of October, 1866, the Defendant refused to accept the title on the same objection which had been taken by *Thirtle*; and in January, 1868, the Plaintiff instituted this suit for specific performance.

The Defendant, by his answer, in addition to the objection of title, alleged that the orders of the Court had been obtained by fraud on the part of Mrs. *Heighton's* solicitor for his own benefit, and that the arrangement as to the costs was not fairly stated to the Court. The record was, however, produced before the Court of Appeal, and it was ascertained that the facts were fully stated in the Petition.

The Master of the Rolls held that the objection taken to the title was a valid one, and that the conditions of sale did not pre-

clude the purchaser from taking the objection, and he accordingly dismissed the bill. From this decision the Plaintiff appealed. (1).

(1) 1868. Dec. 3. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

With regard to the objection to the title two questions arise: First, whether the objection is valid; secondly, whether the Defendant is precluded from taking it. On the first, the real point to be determined is, whether the person or persons who may be the heir or co-heirs of Mrs. *Heighton* at her death are bound by this order for sale under the provisions of the Act. In considering this point, this, first, is clear, that the person or persons, whoever he or they may be, who shall be the heir or heirs-at-law of Mrs. *Heighton* at the time of her decease, in default of any appointment made by her, take as purchasers, and not by descent from Mrs. *Heighton*. Secondly, it is equally clear that it is impossible to ascertain till the death of Mrs. *Heighton* who this person or these persons may be. Thirdly, this proposition also appears to me to be clear, that if the person who ultimately is to become such heir happens to be now alive, no notice to him will bind him, for the notice would be given to him in a different capacity, and cannot be given to him in his character of heir-at-law. In suits instituted in this Court it is not sufficient that the man who is the legal personal representative of a deceased person being a necessary party to the suit, is a Defendant in some other character. In such a case the bill is required to be amended for the purpose of bringing him before the Court also as the legal personal representative of the deceased person. In this case the children of Mrs. *Heighton* have been made parties to the order on the Petition, but upon the principle I have stated this will not bind that one of them, if there shall be one of them, who shall hereafter turn out to be the heir-at-law of Mrs. *Heighton*. In fact, the appearance of these children on the occasion of the order made on the Petition was wholly unnecessary. The parties whose consent is required by the Act are specified in the 17th section:—[His Lordship read the 17th and 18th sections.] I think the concurrence of Mrs. *Heighton's* heir-at-law is essential to make the title perfect, and I think that it was, and is, impossible to obtain the concurrence of the person who will be Mrs. *Heighton's* heir-at-law in that character, and that consequently his interest, when it arises, if it should ever arise, will not be bound by this sale. I am further of opinion that the defect is not cured by any clause in any subsequent Act relating to this subject, indeed there is no clause that I have found in any subsequent Act which touches this point or makes complete an order which was in its inception defective. All the Acts proceed on the principle that the person to concur must be ascertained. I am not now referring to the case of persons under disability, who stand on a separate ground, and whose interests are protected by trustees and by the Court; but in all other cases where an interest exists in a specified person, his concurrence is required. I am of opinion, therefore, that the objection is a good one, and that the title is defective.

On the second point I am of opinion that the Defendant is not precluded by the conditions of sale from taking this objection:—[His Lordship read the 6th condition.] No doubt this was introduced to meet this very point, but in my opinion this does not compel the purchaser to take the title when the inspection of the settlement there referred to shews that the order of this

L. JJ.
1869
BEIOLEY
v.
CARTER.

Mr. *Joshua Williams*, Q.C., and Mr. *Upton*, for the Appellant:—

The order for sale was properly made, and binds all persons claiming under the settlement. There is no doubt that this is a settlement within the 1st section of the Act, for wherever there is an estate for life there is a succession; therefore the powers of the Act may be put in force on the application of the tenant for life, unless those powers are restricted by something in the 17th section which requires the consent of the persons interested. The 17th section requires the consent of "all persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child." Here the only person in existence having any beneficial interest was Mrs. *Heighton;* and the trustee who concurred in the order represented the unascertained persons.

Court was erroneous, and that it had no power to bind the contingent interests which may hereafter arise on the death of Mrs. *Heighton*. I entertain this opinion the more strongly, because I have always thought that where the vendor wishes to preclude the purchaser from taking a particular objection to the title, which must appear on the documents submitted to him, it is essential that the vendor should, as a matter of good faith, point out, if not the objection itself, the nature of the objection, in the conditions of sale. Here the vendor knows that the person who will be the heir-at-law of Mrs. *Heighton* at her death is not bound by the order, and that if she dies without making any appointment, he will be entitled to the property; instead of indicating this fact to the person who may be disposed to become the purchaser, he simply assumes that the order of the Court must be correct, and says that there shall be no inquiry into, or objection taken to, any earlier title than the conveyance of January, 1862. The purchaser naturally supposes that the order of the Court is correct, and that the Court could not be induced to make a fruitless order; but the inquiry made by the purchaser as to the settlement of 1837, which is sanctioned by the conditions of sale, shews that the Court had no power to make such an order without expressly reserving the rights of the heir-at-law of Mrs. *Heighton*, and that the vendor has no power to give a complete title to the reversion after Mrs. *Heighton*'s death.

This, therefore, is in the nature of deception to the purchaser, and does not preclude him from taking the objection, of which he had no notice. On all the grounds, therefore, I am of of opinion that the vendor cannot shew a good title to the property; and that the bill must be dismissed, and of course with costs. Having disposed of the case on this ground, I think it unnecessary to go into any of the other circumstances set forth in the Defendant's answer, which have no relation to the sole ground on which I dismiss this bill.

The saving clause in the 18th section gives power to the Court to reserve the rights "of persons whose consent or concurrence has been refused or cannot be obtained;" but that can only refer to persons who are capable of consenting or refusing to concur, not to unascertained persons. The construction for which the Defendant contends would exclude the operation of the Act in any case where there is a contingent remainder in an unascertained person. But whether the order for sale was properly made or not, now that it has been completed, it is protected by the 28th section, which provides that "after the completion of any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorize the same:" *In re Greene's Settled Estates* (1); *In re Laing's Trusts* (2); *In re Thompson's Settled Estates* (3). Moreover, we contend that the Defendant is precluded by the conditions of sale from taking the objection.

Mr. *Southgate*, Q.C., and Mr. *Bristowe*, for the Defendant:—

The Court had no power under the Act to make an order binding all persons claiming under the settlement. It may be doubted whether this was a settlement within the meaning of the Act: *In re Burdin's Will* (4). But assuming it to be a settlement within the meaning of the Act, the contingent remainder to the heir of Mrs. *Heighton* is not affected by the order. It was never intended that a tenant for life should have the power of obtaining an order to dispose of the estate without the consent of the remainderman; and if the remainderman is not ascertained the powers of the Act cannot be exercised at all. The 18th section excludes the jurisdiction in cases where there is a person entitled to an estate of inheritance whose consent cannot be obtained. The 28th section was only intended to protect purchasers against formal objections; and, moreover, it carefully provides that no sale shall have any effect against any person "whose concurrence in or consent to the application ought to have been obtained and was not obtained."

(1) 10 Jur. (N.S.) 1098.
(2) Law Rep. 1 Eq. 416. 12 Jur. N.S. 119
(3) Joh. 418. 5 Jur. N.S. 1343.
(4) 7 W. R. 711; on appeal, 28 L. J. (Ch.) 840. 5 Jur. N.S. 1378

L. JJ. 1869 BEIOLEY v. CARTER.

The condition of sale was delusive, and did not indicate the nature of the objection to the title.

[The LORD JUSTICE GIFFARD:—We feel no doubt that you were not precluded by the condition of sale.]

The circumstances under which the order was obtained amounted to a fraud on the Court. The Plaintiff was a nominee of the solicitor, who was in fact the real purchaser; and the transaction was a scheme to get the costs out of the purchase-money. Under these circumstances, even if the Court is against us as to the construction of the Act, this is far too doubtful a title to be forced upon a purchaser.

SIR C. J. SELWYN, L.J.:—

We have not lost sight of the fact that this is a suit for specific performance, nor of the fact that the greatest weight is due to the opinion of the Master of the Rolls, nor of the observations of the Lords Justices in *Collier* v. *McBean* (1), in which the difficulty and danger of forcing a doubtful title upon a purchaser are dwelt upon. At the same time it is the duty of a Court of Appeal to form an opinion upon the question of title and to act upon it, as is well expressed by Lord *St. Leonards* in the case of *Sheppard* v. *Doolan* (2). His Lordship there says: "With respect to the common cases of doubtful title, I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the Superior Court would still be bound to exercise his own discretion, and decide according to his own judgment. I have myself often argued at the Bar in support of the proposition, but always without success; for although I have urged that no Judge could consider a title to be free from doubt when one or two Judges competent to decide the question had pronounced it to be defective, I have been ever met by this answer—that to adopt such a doctrine would be in effect to leave the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above." We, therefore, consider it to be our duty to decide the case, and in doing so there are two questions to be considered.

(1) Law Rep. 1 Ch. 81. (2) 3 D. & War. 8.

L. JJ. 1869

BEIOLEY v. CARTER.

The first question is, whether the Master of the Rolls had jurisdiction to make the original order for sale. This turns upon the construction of the *Settled Estates Act* (19 & 20 Vict. c. 120), and first we have to consider whether the limitations in the present case constituted a settlement within the meaning of the Act. [His Lordship then shortly referred to the limitations of the marriage settlement, and continued:—] Mrs. *Heighton* is still living, and it is admitted that the ultimate limitation amounts to a gift to her heirs as purchasers and not by descent, and that the rule in *Shelley's Case* (1) does not apply. I have no doubt that such limitations constitute a settlement within the meaning of the Act. The other point for consideration is, whether the proper persons were served with and consented to the Petition. The only persons in existence who had any estate or interest at the date of the order were, first, the trustee of the legal fee; and, secondly, the lady, her husband being also joined with her by reason of his authority as husband, but having no interest in the property, which was settled to the lady's separate use. They all concurred in the application for a sale. Was it necessary that the person who will be Mrs. *Heighton's* heir should be represented, and did his absence invalidate the order? It is clear that as *nemo est hæres viventis*, such person could not then be ascertained or served with notice of the application. On the supposition, probably, that one of Mrs. *Heighton's* children would be her heir, notice was given to the children, and they, through their guardian, consented to the application; but it is clear that they had no present interest. The question then is, whether it was necessary that any other person should be present to represent the equitable inheritance besides the trustee. The 16th section of the Act provides that "any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life, or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act." One of the powers conferred by the Act is a power to sell a settled estate. If, therefore, we have a settled estate within the meaning of the Act, and the proper person petitions, as is the case here, what remains is to see whether there is

(1) 1 Rep. 219.

L. JJ. 1869 BEIOLEY v. CARTER.

anything in the other sections to prohibit the Court from exercising its powers. The 18th section may be set aside, for that only gives power to the Court to make a limited order under certain circumstances. If the state of things there referred to existed in the present case, that power has not been exercised. We are, therefore, reduced to the inquiry, whether the 17th section creates any such exception as precludes the Court from making the order. Having heard the able argument of Mr. *Southgate*, I am unable to see that it does impose any such fetter or limitation upon the power of the Court, and in my judgment, as the tenant for life filed the Petition, and the trustee concurred, I think it was a case in which the Court was competent to exercise its jurisdiction. In addition to this we have the 28th section, which puts the case in the same position as that in which sales made under the ordinary authority of the Court have been held to be. The rule is well stated in *Lloyd* v. *Johnes* (1), and I understand it to be, that if all persons interested are before the Court mere irregularity will not avail to invalidate the order; but if the proper persons were not present, the order may be objected to. So it would be in the present case, but a person whose consent is to be obtained must be one whose consent is capable of being obtained, not one who is not in existence. I may refer to another judgment of Lord *St. Leonards* in *Bowen* v. *Evans* (2), where he says: "First, there is *Lloyd* v. *Johnes*, in which Lord *Eldon* held that the purchaser should not lose the benefit of his purchase by reason of an irregularity in the proceedings; that case has been explained by Lord *Redesdale* in *Bennett* v. *Hamill* (3), and by Sir *W. Grant* in *Curtis* v. *Price* (4). Lord *Redesdale* seems not to have entirely agreed with Lord *Eldon*, but, with great deference to the high authority with whom I am compelled to differ, I entirely subscribe to the doctrine of Lord *Eldon*. In *Curtis* v. *Price* the Master of the Rolls, though not called on to decide the point, declared his opinion to be, that although accounts were not taken or inquiries directed which ought to have been taken and directed, yet that being the act of the Court it could not affect the purchaser; and he was also of opinion that

(1) 9 Ves. 37.
(2) 1 J. & Lat. 178, 258.
(3) 2 Sch. & Lef. 566, 579.
(4) 12 Ves. 89.

a direction by the Court to pay the purchase-money to a wrong person would not affect the purchaser. I entirely subscribe to that opinion. I think that though there may have been some advantage taken of the parties to the cause, it ought not of itself to constitute a ground for impeaching the sale; for it would be extremely dangerous to impress upon the minds of purchasers under decrees that that which had escaped the vigilance of the Court, of its officers, and of the Bar, would form a sufficient ground to set aside a sale. I could not lay down a rule more mischievous to the suitors of the Court and the interests of the public, for it is of the greatest importance that sales made under the authority of the Court should not be lightly set aside."

Entirely subscribing to these observations, I think that the 28th section would remove any objection which could be raised to the title in this case by any subsequent purchaser.

But the Defendant relies on another ground, namely, that the order was obtained by a fraud upon the Court. If so, the decree of the Master of the Rolls dismissing the bill was right. We have therefore now to consider whether this defence has been established. The Petition for the sale was perfectly regular, but the same objection was taken by the purchaser as has been taken on this occasion; and the solicitor being anxious not to lose his costs, the objection was submitted to, and another purchaser was substituted for the original purchaser, and the costs were deducted from the purchase-money paid into Court. It cannot be denied that there may be cases in which the costs may be properly allowed out of the purchase-money. We have examined the Petition, and we find that the facts as to the arrangement with respect to the costs were stated in the Petition, and brought before the Court. This is, at all events, a weaker case than that which was put by Lord *St. Leonards* in the passage I have read of the purchase-money being paid to the wrong person.

But it is also said that the Plaintiff was merely a trustee for the solicitor. [His Lordship then referred to the statements in the answer and in the evidence on that subject, and expressed his opinion that there was no ground for the objection.]

I entertain, therefore, no doubt (although with the greatest respect for the opinion of the Master of the Rolls), that the objec-

L. JJ. 1869 BEIOLEY v. CARTER.

tions to the title taken by the Defendant in his answer cannot be substantiated; and as no other objections to the title have been suggested, the decree must be reversed, and there must be a decree for specific performance.

SIR G. M. GIFFARD, L.J.:—

In deciding this case, I do not forget that this is a suit for specific performance, nor that the decision of the Master of the Rolls is against the conclusions at which I have arrived. But I do not doubt the correctness of the rule laid down by Lord *St. Leonards* in *Sheppard* v. *Doolan* (1), that it is the duty of the Court to express its opinion on a question of title, notwithstanding an adverse decision of the Court below.

We have, therefore, to determine two questions—first, whether the original order was obtained by fraud; and, secondly, whether the Court had jurisdiction to make the order under the *Settled Estates Act.*

As to the first question, we have these facts—that a fair price was given for the land, which was sold by auction—that an objection was made to the title—that another purchaser was obtained by the solicitor, and substituted for the original purchaser—that he was a friend of the solicitor, and willing to oblige him, and that he was indemnified by the solicitor. These are the facts; and we also find that the arrangement which had been made as to the costs was stated to the Court in the Petition, and that thereupon an order was made that the costs should be paid by the purchaser, and the rest of the purchase-money paid into Court. By what took place the purchase-money has been materially reduced, which is much to be regretted, but that cannot invalidate the order for sale. And as to the other circumstances attending the purchase, I am satisfied there is nothing in them to justify the allegation of fraud.

We come, therefore, to the second question—as to the Act of Parliament. That Act was originally passed to avoid the expense and delay of applying to the Legislature for a private Act in all cases where no powers of sale or leasing were given by the settlement; and the provisions were framed, as far as possible, in conformity

(1) 3 D. & War. 8.

with the practice of the House of Lords with respect to private Acts. The first question is, was this a settlement within the meaning of the Act? I entertain no doubt that it was, and that the Petition was by a person entitled to present one. That being the case the 11th section gives unqualified authority to the Court to exercise the powers of the Act. Then with respect to the consents required by the 17th section, the Master of the Rolls says in his judgment, "I am not now referring to the case of persons under disability, who stand on a separate ground, and whose interests are protected by trustees and by the Court; but in all other cases where an interest exists in a specified person his concurrence is required." It appears, therefore, that His Lordship regarded the heir of Mrs. *Heighton* as a specified person whose consent was necessary. I regret that I cannot concur in this view, for, not being ascertained, he was not a specified person, nor one of whom it could be predicated that he had a beneficial interest. The terms of the 17th section are, "all persons in existence having any beneficial interest under or by virtue of the settlement." It appears to me that those terms cannot apply to a case where there is no ascertained person in existence who has any beneficial interest. I think, therefore, that the Master of the Rolls was mistaken as to the construction of the clause. The provision that notice must be given rests on the supposition that there is some ascertained person in existence who has an interest.

Mr. *Southgate* contended that the Act only contemplated a sale by consent of the persons interested in the estate, and that if there was no person capable of consenting there could not be a sale under the Act at all. But such a construction would cut down the operation of the Act to a very great extent, for if that were so, in every case where there was a settlement to a man for life with remainder to his children, and there were no children, there could not be any sale under the Act. This would be much too narrow a construction. It must be observed that the Act gives an unqualified power of sale in the first instance, followed by a proviso that the application must be made with the consent of certain persons; but I think that it cannot be assumed to mean that consent must be given where, from the nature of things, it is impossible. This view is borne out by the observations of Lord Justice *Turner* in

L. JJ. 1869 BEIOLEY v. CARTER.

Hawkins v. *Gathercole* (1), as to the principles of construing Acts of Parliament. With respect to the 18th section, I think that it does not affect the construction of the 17th; and the effect of the 28th section is that it has no operation if the order for sale was right, and if it was not right, any informality in it will not be allowed to interfere with the validity of the sale.

The title is, in my opinion, perfectly good. There must, therefore be a decree for specific performance.

Solicitors for the Plaintiff: Messrs. *Vallance & Vallance.*
Solicitors for the Defendant: Messrs. *J. & C. Rogers.*

L. JJ. 1869 Jan. 18.

TOOTH *v.* HALLETT.

Equitable Assignment—Moneys due under a Building Contract—Building completed by Assignee.

A builder assigned to *T.* £200 of what should be coming to him under a building contract with *A.* The contract provided that the building should be finished by a certain day, and if not, that *A.* might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards the builder executed a creditors' deed. The trustee of this deed completed the building with his own money and was repaid by *A.* Allowing this repayment as proper, nothing remained due on the contract. *T.* then filed his bill to enforce payment of the £200 :—

Held (affirming the decision of *Malins*, V.C.), that the payments by *A.* to the trustee were proper, and that the bill ought to be dismissed with costs.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Malins*, dismissing their bill with costs.

On the 17th of March, 1866, *George Hampton*, a builder, entered into a contract in writing with the Defendants, *Hallett & Abbey*, who were brewers at *Brighton*, to build a public house for the sum of £872. The contract provided that the house should be completed and delivered up to *Hallett & Abbey* on or before the 17th of July, 1866; that 75 per cent. should be paid to *Hampton* when work to the value of £200 should have been certified by *Hallett & Abbey's* surveyor as executed, and the balance of the contract

(1) 6 D. M. & G. 1.

price at the expiration of three months from the delivering up of the works completed and certified by the surveyor. *Hampton* also covenanted with *Hallett & Abbey* that if he should fail to deliver up the works completed on the 17th of July, 1866, he would pay them £10 for every week the works remained unfinished, and that they should be empowered to stop the same as liquidated damages out of any moneys that might be due to him; and that they should be at liberty after the 17th of July, 1866, if they should so elect, to employ other builders to complete the works; and that the amount so expended in completing the works should be recoverable from *Hampton*, and that any moneys in hand due to *Hampton* might be applied towards the satisfaction of such other builders.

The Plaintiffs, who were timber merchants, had been in the habit of supplying timber to *Hampton*, and in August, 1866, he required timber from them, which they refused to supply unless he gave them security for a sum of £200 which he owed them for timber already supplied. He accordingly, on the 29th of August, 1866, gave the Plaintiffs a written order on *Hallett & Abbey*, signed by him, in the following terms:—"I will thank you to pay to Messrs. *Tooth & Co.* £200 due on my building account with you." At this time the public house was still unfinished, and £450 had been paid by *Hallett & Abbey* to *Hampton* for the work already done. *Edward Beves*, one of the Plaintiffs, took the order to the Defendant *Hallett* on the 1st of September, 1866, and *Hallett* told him that there was no money at present payable to *Hampton*, and that he had had all that had been certified as due to him, less 25 per cent.; that the time for finishing the house had expired five or six weeks ago, and that it was only out of consideration for *Hampton* that *Hallett & Abbey* had forborne to exercise their power of employing another builder to finish the house, but that if matters did not mend they should employ another builder, and in that case there would be probably nothing at all coming to *Hampton*. Thereupon *Beves* asked *Hallett* to give his firm the opportunity of finishing the house if they determined to take it out of *Hampton's* hands, and *Hallett* said he would do so. On the 7th and 15th of September, 1866, *Hallett & Abbey* advanced two sums of £30 and £40 to *Hampton* to enable him to buy materials to complete the house. On the 14th of September, 1866, *Hampton*, by a deed under the *Bank-*

L. JJ. 1869 TOOTH v. HALLETT.

ruptcy Act, 1861, assigned all his estate to the Defendant *Woollett* as a trustee for the benefit of his creditors. On the 18th of September, *Hallett & Abbey* wrote to *Woollett*, telling him that the time for completion having long since expired, they should enforce the penalties against *Hampton's* estate, and shortly afterwards *Woollett*, with the consent of *Hallett & Abbey*, completed the house, and expended in doing so money out of his own pocket, which was afterwards repaid to him by *Hallett & Abbey*. This payment having been made, nothing remained due on the contract. *Woollett* had no funds in his possession belonging to *Hampton's* estate.

On the 21st of June, 1867, the Plaintiffs filed this bill praying for an account of the moneys which became due from *Hallett & Abbey* to *Hampton* or his assignees, in respect of the building contract, and for a declaration that those moneys were effectually charged with the payment of £200 to the Plaintiffs, and that the Defendants might be ordered to pay the £200 to the Plaintiffs. The Vice-Chancellor having dismissed the bill, the Plaintiffs appealed.

Mr. *De Gex*, Q.C., and Mr. *B. B. Rogers*, for the Plaintiffs :—

The subsequent advance by *Woollett* to finish the house cannot have priority over the Plaintiffs' security; they, in fact, found the timber for the house. A second mortgagee cannot improve the first mortgagee out of his security, at any rate without giving him notice first. The case is distinguishable from that of *Myers* v. *United Guarantee and Life Assurance Company* (1), as there the first mortgagee was warned that money must be expended on the mortgaged property or it would be lost. In the present case, no notice was given to the Plaintiffs. The real question is, whether the mortgagor's assignee in bankruptcy can, by laying out money on the mortgaged property, deprive the mortgagee of his security. The point has never been actually decided, but equity is against the assignee. [They also referred to *Garden* v. *Ingram* (2), and *Langton* v. *Langton* (3).]

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the Defendants, were not called upon.

(1) 7 D. M. & G. 112. (2) 23 L. J. (Ch.) 178. (3) 7 D. M. & G. 30.

L. JJ.
1869
TOOTH
v.
HALLETT.

SIR C. J. SELWYN, L.J.:—

I entirely concur with the judgment of the Vice-Chancellor. The Plaintiffs claim by virtue of an assignment made to them by *Hampton* of moneys due under the building contract. By that contract *Hampton* had agreed that the whole works should be completed on the 17th of July, 1866, and that he would deliver up the buildings to *Hallett & Abbey* on that day, and that if that were not done, certain penalties should be enforceable against him, and that *Hallett & Abbey* should be at liberty to employ other builders to complete the works. The thing, therefore, which was assigned to the Plaintiffs was not any absolute property of *Hampton*, but that which was coming to him under the building contract, and was, therefore, subject to the conditions of that contract, among which was the right of *Hallett & Abbey*, in case of *Hampton's* default, to employ other builders to complete the building. Shortly after the assignment the Plaintiffs were informed by *Hallett* that no money was due to *Hampton*, inasmuch as the time limited for the completion of the house had then expired. On the 14th of September, 1866, *Hampton* executed a deed which was equivalent to a bankruptcy, assigning all his property to the Defendant *Woollett* in trust for his creditors. On the 18th of September, *Hallett & Abbey* wrote to *Woollett* telling him that the time appointed for the finishing of the building had long expired, and that they intended to enforce the penalties against *Hampton's* estate. Was there then, under the circumstances, anything due to *Hampton*—anything which could be made the subject of a valuable assignment to the Plaintiffs? It is admitted that if a third person had been called in to finish the buildings anything paid to him might have been deducted from what was coming to *Hampton;* and if so, in point of fact, there would be nothing due to *Hampton*. We have, therefore, to decide whether, because the trustee under the creditors' deed, having no funds belonging to the debtor's estate in his hands, completed the building with his own moneys, the prior assignees stood in a better position than if a third person had been employed by *Hallett & Abbey* to complete the works. The Plaintiffs had no right to stipulate for the employment of any particular persons for that purpose. It has been admitted that *Woollett* made no profit by the transaction,

L. JJ. 1869 TOOTH v. HALLETT.

and I am unable to see how the Plaintiffs are in any better position than if the money for completing the buildings had been advanced by a third person. I think, therefore, that the Vice-Chancellor was quite right in dismissing the bill, and that the appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

This is not the case of a mortgagor expending money upon the mortgaged estate: nor is it the case of an assignee in bankruptcy who has expended money belonging to the bankrupt's estate; but it is the case of a gentleman who has expended his own money in completing this building. The Plaintiffs wish to get the benefit of that expenditure, and to take from Mr. *Woollett's* pocket the value of all the work which he has done, on the ground that *Hampton* made an assignment to them of what should be coming to him from the building contract. Under the circumstances which existed, nothing at all could be coming to him from that contract. It is not, I think, carrying the principle of the cases of *Myers* v. *United Guarantee and Light Assurance Company* (1), and *Bristow* v. *Whitmore* (2), too far to apply it to the present case. The appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Tilleard, Son, Godden, & Holme.*

Solicitors for the Defendants: Messrs. *Linklaters, Hackwood, & Addison.*

(1) 7 D. M. & G. 112. (2) 9 H. L. C. 391.

BARNARD *v.* FORD.
CARRICK *v.* FORD.

L. JJ.
1869
Feb. 16, 17.

Wife's Equity to a Settlement—Debts before Marriage—Practice—Title of Official Assignee—Inchoate Title.

Where a woman before her marriage is indebted, she is not entitled to any equity to a settlement out of her property until her debts incurred before her marriage have been provided for.

An official assignee filed a bill to impeach a settlement of part of the bankrupt's property. He was not formally appointed assignee of the bankruptcy until after the filing of the bill:—

Held, that the official assignee had an inchoate title before the filing of the bill, and it was sufficient if he produced the order appointing him assignee at the hearing of the cause.

The decree of the Master of the Rolls affirmed.

Post 97

THIS was an appeal from a decree of the Master of the Rolls.

The facts were shortly as follows:—

On the 22nd of October, 1861, *Augusta Barnard*, the Plaintiff in the first suit, then the widow of *C. Harwood*, was married to the Defendant *J. G. Barnard*.

At the time of the marriage Mrs. *Barnard*, and also the Defendant *J. G. Barnard*, were largely indebted to various persons. Mrs. *Barnard* was entitled to an annuity of £300 for her life, charged upon an estate of her late husband, *C. Harwood*.

On the 17th of January, 1862, Mr. and Mrs. *Barnard* executed a settlement whereby they assigned the annuity of £300 to the Defendant *Henry Ford*, upon trust to indemnify *J. G. Barnard* against three sums of £460, £920, and £620, charged thereon by Mrs. *Barnard* before her marriage, and, subject thereto, upon trust to pay the annuity to Mrs. *Barnard* for her separate use.

On the 15th of November, 1862, *J. G. Barnard* was adjudicated a bankrupt in *London*, and the bankruptcy was afterwards transferred to the *Exeter* District Court of Bankruptcy. No creditors' assignee was ever chosen. Debts to a large amount were proved under the bankruptcy, several of which had been contracted by Mrs. *Barnard* previously to her marriage.

On the 27th of April, 1867, Mrs. *Barnard* filed the bill in the first-

L. JJ. 1869 BARNARD v. FORD. CARRICK v. FORD.

mentioned suit against *Henry Ford*, the trustee of the settlement, praying that he might be ordered to pay the annuity of £300, together with the arrears then due, after paying thereout the interest due on the mortgages, to the Plaintiff. The Defendant *Ford* put in an answer, objecting that Mr. *Carrick*, the official assignee of the *Exeter* Court of Bankruptcy, ought to be made a party to the suit. Mrs. *Barnard*, however, brought her suit to a hearing without making *Carrick* a party.

Carrick accordingly filed the bill in the second suit against Mr. and Mrs. *Barnard* and the trustee, praying that the settlement might be declared void against him as such assignee, and that the suit might be taken as a cross cause to the suit of *Barnard* v. *Ford*. Mr. and Mrs. *Barnard*, by their answer, denied that the Plaintiff was official assignee, and it appeared that he had never been formally appointed by the Commissioner as assignee in *Barnard's* bankruptcy. That defect, however, was remedied before the causes were brought to a hearing, by an order of the Commissioner appointing the Plaintiff assignee in the bankruptcy, which order was made to bear date before the filing of the bill in the first suit.

Under these circumstances the Master of the Rolls dismissed the suit of *Barnard* v. *Ford* with costs, and made a decree in *Carrick* v. *Ford* declaring the settlement void as against the creditors of Mrs. *Barnard* before her marriage.

Mrs. *Barnard* appealed from this decree.

Sir *R. Baggallay*, Q.C., and Mr. *Herbert Smith*, for the Appellant:—

Mr. *Carrick* shewed no title till after the filing of his bill, which was after the first suit was ready for hearing. His title is not like that of an administrator, whose letters of administration relate back to the death of the intestate: *Humphreys* v. *Humphreys* (1). The title of the official assignee dates only from his appointment to that particular bankruptcy; just as before the Act of 1849 it dated from the assignment to him of the bankrupt's property: *Doe* v. *Mitchell* (2); 6 Geo. 4, c. 16, ss. 64–66; *Bankruptcy Act*, 1849, ss. 39–141; Orders of 1852, rule 121.

(1) 3 P. Wms. 349. (2) 2 M. & S. 446.

With respect to the merits, there is no instance of an attempt like this to set aside a marriage settlement as against creditors. If there had been no settlement, the trustee would not have been permitted to pay Mrs. *Barnard's* annuity to the assignee of her husband's creditors. She would have been entitled to her equity for a settlement out of it: *Spirett* v. *Willows* (1).

Mr. *Southgate*, Q.C., and Mr. *Bevir*, for the Plaintiff in the second suit:—

The objection as to the title of the official assignee is merely one of form. There is only one official assignee of the *Exeter* Court of Bankruptcy, and there could therefore be no doubt who would be assignee. His title was inchoate at the time of filing the bill, and was perfected before the hearing. As to the merits, Mrs. *Barnard* could have no equity to a settlement till her debts were provided for. We do not desire to overthrow the settlement except to the extent of her debts.

Mr. *Jessel*, Q.C., and Mr. *W. W. Karslake*, for *H. Ford*.

Mr. *Herbert Smith*, in reply.

SIR C. J. SELWYN, L.J.:—

In this case there is no real difficulty nor any dispute, as to the facts. The only question is, whether the husband was at the date of the settlement indebted to the extent of insolvency; so indebted that, according to the principles of this Court, his creditors are entitled to set aside the settlement. The affidavit of Mr. and Mrs. *Barnard* themselves shews this. It is clear that Mr. *Barnard* had no property of his own, and it is admitted that both he and Mrs. *Barnard* owed large sums at the date of their marriage. She alleges that most of her debts were paid off; but it is clear that many were not paid off, and they have been proved in her husband's bankruptcy. Then the husband, having no property of his own, and owing these debts, makes this settlement, by which he gives to his wife for her separate use what would have been his own during the coverture—a thing which, in my opinion, he could not do as against his creditors.

(1) Law Rep. 1 Ch. 520.

L. JJ.
1869
BARNARD
v.
FORD.
CARRICK
v.
FORD.

We then come to these two suits. The first suit, that of *Barnard* v. *Ford*, was not to establish Mrs. *Barnard's* equity to a settlement, but to carry into effect the trusts of the settlement which had been executed. The trustee very properly objected that the official assignee was a necessary party to the suit; but the Plaintiff and her husband would not make him a Defendant. They discovered that there had been an accidental slip with respect to the appointment of the official assignee, and they thought they could take advantage of that, and get the money paid over to themselves. That was the only question which Mrs. *Barnard* thought fit to raise in that suit, namely, whether she could compel the trustee to pay the annuity to her without making the assignee a party; and I think that under these circumstances the Master of the Rolls could take no other course than to dismiss the bill with costs, and that the appeal in that suit fails.

Then with respect to the suit of *Carrick* v. *Ford*, I think that the only substantial question is, whether the creditors have an equity to set aside the settlement. The question of the appointment of the assignee is only a question of form. In my opinion there is no force in the objection. We have the order of the Commissioner appointing the Plaintiff assignee in the bankruptcy, and until that order is set aside it must be held to be valid. I think that the Plaintiff is entitled to a decree to set aside the settlement, and that the decree of the Master of the Rolls is right in principle. It must be slightly altered in form, for it only declares the settlement void against the debts due from the wife at the time of the marriage, which is explained by the fact that the Plaintiff was content to restrict his claims to the debts due from the wife. But we think the decree should extend to the husband's creditors generally.

The settlement being set aside, the question arises whether Mrs. *Barnard* is entitled to an equity for a settlement out of the property. That equity, of course, depends upon the question whether there is any property of the wife which can be settled. It has been contended that if a lady at the time of her marriage owes more than the whole amount of her property, she will still have an equity to a settlement out of her property. To accede to such a proposition would be to turn this Court into an engine of

fraud. There must, therefore, be a declaration in this form :—That Mrs. *Barnard* is entitled to no settlement until after provision is made from her property of an amount equal to the debts owing from her at the date of her marriage, which shall previously to the Chief Clerk's certificate be proved under her husband's bankruptcy; there will then be an inquiry as to her debts and property; and then an inquiry whether Mrs. *Barnard* is entitled to any settlement, having regard to the above declaration. The costs of all parties in the second suit may be paid out of the fund.

SIR G. M. GIFFARD, L.J. :—

There are two appeals now before us. The first is in the suit of *Barnard* v. *Ford*, in which the bill was dismissed with costs; and, in my opinion, rightly so; since the Plaintiff refused to bring Mr. *Carrick* before the Court, although invited to do so. The other appeal is in the suit of *Carrick* v. *Ford*, in which the main argument has been that the Plaintiff was not in a position to maintain the suit. It may be that when the bill was filed a plea might have been successful, but I am satisfied that the Plaintiff had an inchoate right at the time of the filing of the bill, that it was perfected before the hearing, and that the Court will not now listen to an objection so purely technical.

Then it was contended that this case was like *Spirett* v. *Willows* (1). It would have been so if the debts had been originally the debts of the husband; but here we are asked to sustain the wife's equity to a settlement against her own creditors. I think it would be contrary to good conscience to do so. There can be no equity to a settlement till the wife's debts are provided for. I therefore agree with the decree proposed by the Lord Justice.

Solicitor for the Appellant: Mr. *G. Smith.*

Solicitors for the Respondents: Messrs. *Coode, Kingdon, & Cotton.*

(1) Law Rep. 1 Ch. 520.

L. JJ.
1869
Jan. 21, 28.

In re ASIATIC BANKING CORPORATION.

ROYAL BANK OF INDIA'S CASE.

Contributory—Ultrà Vires—Company a Shareholder—Bankers—Loan upon Security of Shares.

8 Eq. 393
9 Eq. 272
5 Ch. 448
8 Ch. 833.

A banking company *I.*, the articles of which in general terms gave the directors very ample powers of management, advanced money on the deposit of shares in company *A.* The directors becoming alarmed by a judicial opinion that the shares remained within the order and disposition of the depositors, passed a resolution to have the shares transferred into the name of company *I.* or its manager. They were accordingly transferred into the name of company *I.*, the transfers being executed on behalf of company *I.* by an agent, not under the common seal. The company was registered as shareholder, sold some of the shares and received the purchase-money, and received the dividends on the rest. Company *A.* was afterwards ordered to be wound up:—

Held, that although the acts of ownership exercised by company *I.* over the shares would not have prevented its repudiating them if the transaction had been *ultrà vires*, company *I.* was rightly placed on the list of contributories; for that, although buying the shares of another company as a speculation would have been *ultrà vires*, it was within the powers of the company, as bankers, to advance money on the deposit of shares, and to do all such acts as were reasonable and proper for making the security available:

Held also, that the fact of the transfer not being accepted by the company under its seal was immaterial.

The directors of the *I.* company had power from time to time to make by-laws, which were to be entered in a book and signed by three directors. One of the by-laws which they made prohibited the taking a transfer of shares into the name of the company. The resolution above referred to was afterwards passed by six directors, and entered in their minute book, but was not entered in the book of by-laws, nor signed by three directors:—

Held, that no third person dealing with the directors could be affected by the by-law, unless it was proved that he knew of it, and that in the present case, if he had known of it he would not have been affected by it, for that the resolution of the directors, who had power to alter it, was sufficient to abrogate it.

Decision of *Stuart*, V.C., affirmed.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, refusing to remove the name of the *Royal Bank of India* from the list of contributories (1).

The *Royal Bank of India* was formed in 1863, by memorandum

(1) Law Rep. 7 Eq. 91.

and articles of association, under an Indian Act of 1857, which was almost identical with the *Companies Act*, 1856. The objects of the company, as defined by its memorandum of association, were as follows:—

"The objects for which the company is established are for carrying on the trade of bankers in all its branches, and to do and transact all matters and things incidental thereto as now existing, or which it may at any time hereafter be lawful for establishments carrying on banking, or for dealing in money, or in notes, bills, or other securities for money, to do or transact."

Clause 3 of the articles repeated the above clause of the memorandum, and proceeded to provide that such business should be fixed and determined, and in all respects regulated by such rules, regulations, and by-laws, as the directors of the company might from time to time make, which should be entered in a book kept for that purpose, and signed by three of the directors.

By clause 63, until the directors otherwise determined, three directors were to form a quorum.

Clause 68: "The board of directors shall have generally the entire management, superintendence, control, ordering, and directing of the affairs, business, concerns, and property of the company, including power to buy, sell, or take on lease, land or buildings, or both, for the use of the company as occasion shall require; and shall, in every case not provided for, or inadequately provided for, by these presents, or by any rules or regulations hereafter made or established by any general meeting, have full power to regulate their own proceedings and the mode of conducting their business, and to act in such manner as they may think best calculated to effect and accomplish the objects and purposes for which the company is established, and to promote the welfare of the company; and also have and assume all powers which are requisite or necessary to enable them to carry into effect the objects and purposes for which the company is established, subject, nevertheless, to the provisions and restrictions contained in these presents and Act XIX. of 1857."

70. "The board of directors shall have the full and entire control and disposal on account and for the purposes of the company of all moneys belonging thereto, whether already or hereafter to

L. JJ. 1869

ROYAL BANK OF INDIA'S CASE.

be subscribed or contributed, or in any manner acquired for the purposes thereof."

71. "The board of directors shall have full power, and it shall be their exclusive province, to prescribe the mode of receiving, collecting, and expending the moneys and funds of or owing to the company, and of drawing cheques, and otherwise disposing of the funds and moneys which from time to time shall be in the hands of the bankers or treasurer, or otherwise at the disposal of the company; and the board of directors shall have full power in all respects as they shall think advisable, to direct, control, and provide for the receipt, custody, and issue, management, remittance, and expenditure of the moneys and funds of the company."

By-laws were made by the directors, among which was the following rule:—

"The bank may accept lands, houses, ships, shares in public companies, or any other property, as a security for a debt absolutely and *bonâ fide* previously due and owing, or as security for the payment of any sum for which any person or persons may have rendered himself or themselves liable to the bank; but such security is never to be taken for an original loan, nor are shares in public companies so accepted as security to be transferred to the bank so as to involve it in the liabilities of such companies."

Notwithstanding this by-law, it appeared to have been the course of the *Royal Bank* to make loans on deposit of shares. The practice was for the borrower to give his promissory note, and deposit the share certificates with deeds of transfer executed by him, the name of the transferee being left in blank, and with a power of attorney enabling a nominee of the *Royal Bank* to receive the dividends. Among the shares so taken were 1000 shares in the *Asiatic Banking Corporation.*

In the early part of 1865 it was decided by one of the Indian Courts, that securities of this nature were invalid as against execution creditors of the depositors. The directors of the *Royal Bank* being alarmed at this, passed the following resolution on the 30th of March, 1865, at a meeting at which six directors were present:—

"The meeting having had under consideration the system of advancing loans upon shares, resolved, that, with the exception of

the shares of the *Royal Bank*, only the shares of companies registered with limited liability, or shares of companies incorporated by royal letters patent, should be advanced upon; that no advances should be made on any shares on which less than one-half the amount of the capital was paid, and that any shares upon which loans were granted should be registered in the name of the manager or in the name of the bank." This minute was duly entered in the minute book of the directors, but was not signed by three directors nor entered in the book of by-laws.

The 1000 shares were accordingly transferred into the name of the *Royal Bank*; the name of the *Royal Bank* being filled in, and the transfer deeds executed by the manager on behalf of the bank, the common seal of the bank not being used. The transfers were completed and the shares registered in the name of the bank at different times between the 11th of April, 1865, and the 12th of December, 1865. At various times between the 11th of April, 1865, and the 5th of July, 1866, the *Royal Bank* sold, and received the purchase-money for, a number of these shares, and transferred to the purchasers the shares so sold. The number held by the bank was thus reduced to 605, of which number the bank remained the registered holder down to the date of the order for winding up the *Asiatic Bank*. In July, 1865, and February, 1866, the *Royal Bank* received dividends on the shares for the time being standing in its name.

Vice-Chancellor *Stuart* having refused to remove the name of the *Royal Bank of India* from the list of contributories, the present appeal was brought.

Mr. *Karslake*, Q.C., and Mr. *Fry*, for the appeal motion:—

The *Royal Bank* had no power to become a shareholder in another bank. The acceptance of shares in another company, thus involving the shareholders in the liabilities of another partnership with which they have no concern, is *ultrà vires* and invalid, and all the acts of ownership done are insufficient to ratify it. The having shares transferred to the bank is expressly forbidden by the by-laws, which are referred to in the articles, and form part of the constitution of the company. It was also *ultrà vires* in the *Asiatic Bank* to admit another company as a shareholder. Moreover, the

L. JJ. 1869

ROYAL BANK OF INDIA'S CASE.

Royal Bank never accepted the shares under seal, and there is nothing to bind it in its corporate character.

[*Spackman* v. *Evans* (1) was referred to.]

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

It is, no doubt, *ultrà vires* for a company to take shares in another company as a speculation, unless its articles authorize it to do so; but it is part of the ordinary business of banking to make advances on the deposit of shares, and no act done in the reasonable course of realizing the security can be deemed *ultrà vires*. The by-laws are not public documents, and no one outside the company can be affected by them unless he is shewn to have had notice of them. Moreover, the directors had power to rescind this by-law, and did so. That the transfers to the *Royal Bank* were not accepted under seal is immaterial: *In re Barned's Banking Company* (2); which authority also establishes that one company may be a shareholder in another.

Mr. *Karslake*, in reply.

SIR C. J. SELWYN, L.J.:—

The memorandum of association constituting the *Royal Bank of India* declares its object to be to carry on the trade of bankers; and its power to do everything incidental to the business of banking is expressed in the most wide and unlimited terms. Then the 71st of the articles of association gives to the directors powers of very extensive and general character—in fact, to do everything which in their judgment should be necessary for the purpose of carrying on this business of banking. It is argued, however, that the by-laws were in a certain sense incorporated with the articles, and that they control the powers of the directors. But it is to be observed, that the articles and the memorandum constitute the whole of what may be termed the public document in such a case as this. The memorandum is, except under very special circumstances, not capable of being altered at all, and the articles are, excepting also under special circumstances, the governing and

(1) Law Rep. 3 H. L. 171. (2) Law Rep. 3 Ch. 105.

L. JJ.
1869
ROYAL BANK OF INDIA'S CASE.

binding laws of the company. But these by-laws, to which no one but the officers of the company has access, not only are not unalterable laws, but they are laws which may be from time to time altered in any way by the directors of the company as they may think fit, subject, it is true, to the regulation that those alterations are to be entered in a book, and signed by three of the directors. It appears that the directors did pass certain by-laws, which are entered in the book, with respect to the nature of the securities which they should take, and amongst them was one upon which great reliance is placed. [His Lordship read the by-law set out above.]

Now, with respect to the first question which has been argued, viz., as to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord *Cairns* in the case of *Barned's Banking Company* (1), viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company to do so, having regard to its own constitution as defined by its memorandum and articles; but excluding all these considerations, although in the statute of 1862 the words "person or persons" continually occur, still I think it must be taken to include corporations, and looking at the question as a mere abstract question, in my judgment there is nothing to prevent a corporation from being a shareholder in another trading corporation.

Then the question comes to this:—are the terms, general purport, and effect of the memorandum and articles of association of the *Royal Bank of India* such as to render it *ultrà vires* for its directors to do what they have done in this instance? In the first place, I apprehend that making advances upon shares in public companies is within the ordinary course of the dealing of bankers. This must be obvious to every one who is familiar with the cases which have occurred in this Court. It appears, accordingly, that this bank, in the ordinary course of its business, was in the habit of advancing money and taking as security shares in different com-

(1) Law Rep. 3 Ch. 105.

L. JJ.
1869
ROYAL BANK OF INDIA'S CASE.

panies, and of accepting those shares as security either for money advanced at the time, or for money which had been previously advanced; and the course of business was, that the certificates of shares were deposited with the bank, accompanied by a blank transfer and power of attorney, enabling some nominee of the bank to receive the dividends which accrued due in respect of those shares. Accordingly, they so received the dividends upon a great number of shares in the *Asiatic Banking Corporation*. It appears that a judicial opinion was afterwards expressed, that in that state of circumstances, unless a formal transfer was executed, the bank were only in the position of equitable mortgagees, and that the shares themselves remained in the order and disposition of the borrower or depositor. The directors of the *Royal Bank of India* being alarmed by that decision, accordingly met, and it appears that on the 30th of March, 1865, six directors having been present, they passed a resolution, part of which was, that any shares upon which loans were granted should be registered in the name of the manager, or in the name of the bank. That resolution was duly passed, and entered in the proper book of the company containing resolutions of the directors. It is true that it was not entered in the shape of being a repeal or alteration of the by-law which I before mentioned, nor was it entered in the book of by-laws, nor signed by three of the directors. But the substance of the transaction is this—that the directors having obtained certain securities in the ordinary course of their business, became alarmed by a judicial decision that those securities in their then shape were invalid, or liable to great danger, and therefore they, exercising, in my judgment, ordinary prudence, came to a resolution that that danger should be guarded against in the only way in which it could be guarded against, viz., by completing these mere equitable deposits by legal transfers. It appears to me that this was entirely within the province of the directors, and was an exercise of a reasonable judgment by them under the peculiar circumstances in which they were placed.

Then that resolution, having been passed, was afterwards acted upon, and a great number of shares, of which the bank had before been merely equitable mortgagees, were transferred to them. It appears that the transfers were made on printed forms, at different

intervals between the 11th of April and the 12th of December, 1865. It is true that those transfers are not executed under the seal of the company, but there is what has been termed only a wafer "For the *Royal Bank of India, J. Gordon*, Manager." The transfers having been so executed, it appears that the bank caused itself to be duly registered as a shareholder in respect of these shares. Some of the shares have been sold and transferred by them to purchasers, and they have received the purchase-money in respect of those shares, and have ever since remained registered shareholders as to the rest, which are the 605 shares now in question, and they have received the dividends on those shares. It has been said by Mr. *Karslake*, that the receipt of the dividends is a matter of no importance, because in their character of equitable mortgagees, having in their possession powers of attorney in respect of those same shares, they might have received the dividends under the powers of attorney as much as they did under the transfers. But I think that the sale of so many of these shares was, on the part of the bank, an unequivocal act of appropriation and acceptance by them, and although it be true that they might have received the dividends under the powers of attorney, if those powers had remained in force, it is obvious that having sold some of the shares in the character and capacity of registered shareholders, they must be taken to have received the dividends on the remaining shares in the same character and capacity, and it is equally obvious that the powers of attorney from the former shareholders, whose shares had been transferred to the bank, were put an end to and became inoperative as from the date of those transfers. I think, therefore, under these circumstances, that any question as to the mode in which the transfers were executed by the bank or its agent, becomes quite immaterial, because, as was held by the full Court of Appeal in *Coles* v. *Bristowe* (1), where shares have been so accepted, it becomes quite immaterial whether the deed of transfer has been executed or not. And then, in addition to that, by the 45th section of the *Indian Act* of 1857, it is declared that, "any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged

(1) Law Rep. 4 Ch. 3.

L. JJ. 1869 ROYAL BANK OF INDIA'S CASE.

therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may be in the same manner varied or discharged." It has been said that here there is no evidence of any authority, but I think that under the circumstances which I have already stated, the authority of the bank is most clearly and explicitly proved. There is the resolution of the directors, entered into, as I have already said, under circumstances which rendered it prudent and proper that such a resolution should be come to. Then we have the resolution acted upon by the bank, we have them procuring themselves to be entered as shareholders, and dealing with the shares, and after that I think it impossible that it can be argued with success that there was no authority to their agents to do what in fact was done.

Then it is said that the consequence is one of very great hardship, as involving the shareholders in the *Royal Bank of India* in a great number of liabilities in respect of other companies with which they have had nothing to do, and many cases have been suggested in argument, such as that of bankers becoming partners in a brewing company, or a shipping company, or many other things with which, in their own articles of association, they had no connection whatever. But I think the answer to that is, that such dangers are necessarily involved in lending money upon securities of this kind. Take, for instance, the common case of a banker advancing money upon the security of a ship and the freight. Nothing, probably, would be further from the notion of the banker than entering into any transaction respecting the sailing of the ship, or receiving the freight in respect of that ship. But if he is obliged to foreclose his security, if he is obliged to take possession of the ship, then, as a prudent man, he would necessarily become involved in the management of the sailing of the ship and receiving the freight as constituting the only means by which he could recover the money he had advanced. I may mention one very familiar instance, known to us all, that of a well-known insurance company. Having lent money upon the security of a mortgage on land in *Galway*, and having been obliged to foreclose that mortgage, they became dealers in land in *Galway*

on a very large scale. So in this case, if it is once established that it was within the authority of the directors to lend money upon the security of shares, it necessarily follows that anything which was a prudent and proper act for them to do with a view to obtaining the benefit of such security, was equally within the scope of their authority. If it could have been shewn that it was an act absolutely prohibited by their memorandum or articles of association, then, no doubt, a different question would have arisen, the act would have been *ultrà vires* and incapable of confirmation or ratification, but in my judgment there is no such prohibition, but, on the contrary, the directors had, under the memorandum and articles of association, powers so ample as fully to justify that which was done, and I think that the mere circumstance of their having passed that by-law, of which no public notice was given, and which they had power from time to time to alter as they thought fit, cannot be construed as constituting any such prohibition, more especially when the very same persons who had power to alter that by-law did, for a reasonable cause, pass the resolution under which the acts now in question were done.

The result, therefore, is, that in this case—the company having received the shares in the ordinary course of their business as bankers, as a deposit or security for moneys owing to them, the directors having afterwards, for a reasonable cause, and influenced by the effect of a judicial opinion, and acting for the benefit of the company, and at a meeting duly constituted, resolved that those securities should be changed from equitable securities into complete legal transfers; that resolution having been acted on, and the shares having been, in fact, transferred to the *Royal Bank of India*, and accepted by them, and they having been duly registered as shareholders, and having taken the benefit of the shares, having sold and received the purchase-money for some of the shares, and having in their character of registered shareholders received the dividends on the remaining shares down to the time of the winding-up—I think that the name of the *Royal Bank of India* was rightly included in the list of contributories in respect of the remaining 605 shares, and consequently that the appeal motion must be dismissed with costs.

L. JJ. 1869 ROYAL BANK OF INDIA'S CASE.

SIR G. M. GIFFARD, L.J.:—

This is an appeal by the *Royal Bank of India* seeking to have its name taken off the list of contributories of the *Asiatic Bank*. The *Royal Bank of India* is upon the register of shareholders; it was put there some time ago in respect of these particular shares, along with others; it has, as shareholder, sold some of the shares, and received the purchase-money, and has received considerable sums of money for dividends on the rest. I quite agree, however, that all this would not make the company a shareholder if the transaction was *ultrà vires*.

The *Royal Bank of India* was constituted under the Indian Act of Parliament, which gets rid of the difficulties which sometimes arise as to dealings with corporations—I mean difficulties with reference to the seal, and other matters of that description. It is constituted by a memorandum of association and by articles as a bank for the purpose of lending money, and that upon every species of security. From the very nature of such a company it must, without more, be inferred that the directors have all the ordinary powers which the managers of an ordinary bank would have, and you may safely deal with the managers of such a bank upon that assumption, unless there is something in the articles to restrict their powers, and here the articles tend strongly the other way. If it is sought to import the by-laws into transactions with third parties, it must, according to the ordinary law of principal and agent, be shewn that those third parties knew that there was a restriction upon the general powers of the agents. Now, in the first place, it is not proved that these by-laws were known to the *Asiatic Bank*, and therefore we must assume that they were not so known. Even if they had been known, I think that the subsequent resolution which, although not signed, is recorded—passed, as it was, by six directors—would be abundantly sufficient to get rid of the effect of these by-laws. It is not, however, necessary to decide that point, for I am clearly of opinion that in the dealings between the *Asiatic Bank* and the *Royal Bank of India* all that has to be looked to is the Act of Parliament and the memorandum and articles which constituted the company.

What, then, was the transaction? I quite agree that the *Royal Bank of India* had no authority to speculate in shares, and that if it had gone upon the *Stock Exchange* and bought shares as a

speculation, such a proceeding would have been *ultrà vires*, and all that has taken place would not have been enough to constitute the *Royal Bank of India* shareholders in this bank, or prevent them from repudiating these shares. But the transaction was of quite a different nature. There was a *bonâ fide* loan upon the deposit of shares. That unquestionably is a transaction within the scope and objects of the company, being one within the scope of every ordinary banking business. While that goes on, and while these shares are in the hands of the *Royal Bank of India*, there comes a decision in a Court of Law, from which the *Royal Bank of India* infer, rightly or wrongly, that their shares will be in jeopardy unless they take a transfer of them either into the name of their manager or into their own name. In consequence of that, they take the reasonable course of having the shares transferred into their own name, for the purpose of making those securities which they had taken valid and effective, and for no other purpose whatever. Of course, although no banker is authorized to become a partner with merchants, or shipowners, or builders, or to engage in transactions of that sort, yet he is authorized to lend upon securities of that description, and he is authorized to take every rational course for the purpose of making his securities good and available. In that way he may become liable upon a building contract; in that way he may become liable as a shipowner; in that way he may become liable in respect of matters of freight, or, in fact, in respect of any matters connected with a bill of lading which he holds as a security. I entirely found my judgment on this, that it is within the scope of an ordinary banking business to make the loans which have been made, and to take the deposit of shares as a security; and when the directors, having done so, afterwards took a reasonable and *bonâ fide* course to realize those securities, they cannot now turn round and say that what they did for that purpose was *ultrà vires*, and not justified by their articles of association.

Upon these grounds I am of opinion that the decision in the Court below was perfectly right, and that the appeal must be dismissed with costs. I must say the justice of the case is entirely in this instance with what the law most clearly is.

Solicitors: Messrs. *Freshfields;* Mr. *W. R. Harris.*

L. JJ.
1869
Jan. 30.

HOPE *v.* CARNEGIE.

Motion to commit—Appeal for Costs.

A motion to commit a Defendant for breach of an injunction having been refused without costs, the Defendant appealed:—

Held, that there is no rule that a motion to commit, if refused, must be refused with costs, and that an appeal as to costs in such a case will not be entertained.

Post 690
2 Ch D. 69
4 Ch D 536

THIS was an appeal motion by the Defendant, Admiral *Carnegie*, asking that an order made by Vice-Chancellor *Stuart* on the 3rd of December, 1868, might be discharged or varied, and that the Plaintiffs might be ordered to pay to the Appellant the costs of two motions made on the 28th of July and the 2nd of November, 1868, and his costs of this application.

On the 25th of June, 1868, an order was made restraining the Appellant and his wife, and their agents, until further order, from commencing or continuing any proceedings in the *Netherlands* as to the personal estate of the testator in the cause, and from intermeddling with such estate, and from allowing a certain notice served upon a person having the custody of part of the estate to remain unrevoked.

By an *ex parte* order, dated the 25th of July, 1868, it was ordered that substituted service on Admiral *Carnegie* and two other persons of a notice of motion for the 28th of July to commit Admiral and Mrs. *Carnegie* for an alleged breach of the injunction should be good service on Mrs. *Carnegie*. This service had not been effected on the 28th of July, and on that day the motion for committal was ordered to stand over till the first day of Michaelmas Term, and another order for substituted service of a notice of motion for committal for the 2nd of November, 1868, on the same persons as before was obtained.

The motion to commit was adjourned from the 2nd of November, and was not disposed of till the 3rd of December, when the Vice-Chancellor made the order now under appeal, discharging the orders for substituted service, and ordering that the Plaintiffs and the Defendants, *Carnegie* and wife, or any or either of them, should be

at liberty to make such application as they, or he, or she, might be advised, to obtain the appearance of Mrs. *Carnegie* separately from her husband. And it was ordered that each of the parties should bear their own costs of that application (1).

The Defendant, Admiral *Carnegie*, having given notice of appeal motion to the effect mentioned above, the preliminary objection was taken that this was an appeal for costs only.

Mr. *Karslake*, Q.C., and Mr. *Waller*, for the appeal motion:—

An application to commit which utterly fails, owing to the irregularity of the proceedings, must be refused with costs. There are *dicta* tending to shew that there is now no such rule as that there cannot be an appeal for costs; but if there be such a rule this case comes within the acknowledged exceptions: *Angell* v. *Davis* (2); *Chappell* v. *Purday* (3); *Taylor* v. *Southgate* (4); *Corporation of Rochester* v. *Lee* (5); *Horn* v. *Coleman* (6); *Lord Advocate* v. *Lord Dunglas* (7); *Norton* v. *Cooper* (8); *Owen* v. *Griffith* (9).

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the Plaintiffs, were not called upon.

SIR C. J. SELWYN, L.J.:—

It is admitted that this is an appeal only on a matter of costs, and in my opinion the general rule prohibiting such appeals is not only well established but useful and desirable. That rule, it is true, is subject to exceptions, but does the present case come within any of them? It is urged in the first place that a question of principle is involved—that it is a settled rule that, where a motion to commit fails, it is refused with costs, and that there is no instance to the contrary. My own experience, as well as that of my learned brother, furnishes instances to the contrary, and it is impossible to say that it can be a question of principle whether costs should be given or not in cases where the conduct of the parties has so much bearing on the point. The Judge below is

(1) Law Rep. 7 Eq. 254.
(2) 4 My. & Cr. 360.
(3) 2 Ph. 227.
(4) 4 My. & Cr. 203.
(5) 2 D. M. & G. 427.
(6) 5 W. R. 409.
(7) 9 Cl. & F. 174.
(8) 5 D. M. & G. 728.
(9) 1 Ves. Sen. 250.

L. JJ. 1869 HOPE v. CARNEGIE.

much better able to decide such a question than the Court of Appeal; and in my judgment applications to commit are eminently cases where appeals for costs should not be allowed. Then it is said that this order discharges certain orders as having been improperly obtained, and that this brings the case within the rule that an appeal for costs will be allowed where the order is wrong on the face of it. But that order had been obtained by the Plaintiffs, and the Appellants do not contend that there was anything wrong in discharging it by this order. Then it was said that the order in this case affects the funds which are to be administered in the suit. The suit, it is true, is an administration suit, but this order does not affect the estate, and it is difficult to see how the costs of such a proceeding could be ordered out of the fund.

SIR G. M. GIFFARD, L.J.:—

It is quite unnecessary to go through the cases referred to, all of them being clearly distinguishable from the one before us. If there be any case in which an appeal for costs ought not to be entertained it is a case of contempt, where everything depends on the acts and conduct of the parties.

Solicitors: Messrs. *Young & Jackson*; Mr. *W. H. Rennolls.*

L. JJ. 1869 *Jan.* 11.

In re ACCIDENTAL AND MARINE INSURANCE CORPORATION.

BRIDGER'S CASE AND NEILL'S CASE.

Company—Contributory—Past Member—Forfeiture of Shares—Companies Act, 1862, *s.* 38.

Shareholders in a company limited by shares transferred their shares within a year before the commencement of the winding up of the company. Calls were made on the transferees, which they failed to pay, and the shares were duly forfeited by the directors for the benefit of the company:—

Held (affirming the decision of *Stuart*, V.C.), that the transferors were liable to be placed on the list of contributories as past members of the company.

THESE were appeals from a decision of Vice-Chancellor *Stuart*. Mr. *Bridger* was the holder of five shares in the *Accidental and*

Marine Insurance Corporation, Limited, and he, on the 27th of January, 1866, transferred them to a Mr. *Ball*, the transfer being registered in the company's books on the 5th of February, 1866. On the 21st of March and the 19th of July, 1866, respectively, calls of £5 per share were made by the directors upon all the shares in the company. Both of these calls *Ball* failed to pay; and the directors, in exercise of a power contained in the articles of association, on the 3rd of October, 1866, passed a resolution declaring the shares forfeited for the benefit of the company.

Mr. *Neill* was the holder of fifty shares, which he transferred partly to *Ball* and partly to a Mr. *Banks*. *Ball* and *Banks* failed to pay the above-mentioned calls, and these shares were in like manner forfeited by the directors for the benefit of the company on the 3rd of October, 1866.

On the 24th of October, 1866, the company resolved to wind up voluntarily, and on the 3rd of November, 1866, an order was made to continue the voluntary winding-up subject to the supervision of the Court. When the winding-up commenced there remained the sum of £10 per share uncalled on all the shares of the company, and the whole of this was afterwards called up by the liquidators. In consequence of the inability of the contributories in Class A. of present members to answer this call, the liquidators made out a list B. of contributories who were past members, and included both *Bridger* and *Neill* therein. They both applied by summons to have their names removed, and the Vice-Chancellor dismissed their applications. From these decisions they both appealed.

The material clauses of the company's articles of association relating to the forfeiture of shares were as follows:—

By clause 30 the directors were empowered to purchase shares for the benefit of the company, and it was provided that the company's money might be invested in the purchase of forfeited shares.

By clause 154 the directors were empowered to forfeit, for the benefit of the company, any share on which a call remained unpaid for a period of forty-two days after the time appointed for its payment.

Clause 157: "The forfeiture of a share shall involve the extinction at the time of the forfeiture of all interest in and all claims

L. JJ. 1869

BRIDGER'S CASE AND NEILL'S CASE.

and demands against the company in respect to the share, except only such of those rights as by these presents are expressly saved."

Clause 158: "The forfeiture of a share shall be subject and without prejudice to all claims and demands of the company for calls in arrear thereon (if any), and interest on the arrears, and all other claims and demands of the company against the holder of the share when it was forfeited, and to the rights of the company to sue in respect thereof."

Clause 164: "Shares forfeited or purchased for the benefit of the company may, at the discretion of the directors, be sold or disposed of by them, or be absolutely extinguished, as they deem most advantageous for the company."

Clause 165: "Shares so forfeited or purchased shall, until sold, or disposed of, or extinguished, form part of the reserved fund, and the dividends declared thereon shall be carried to the reserved fund."

By the evidence of one of the liquidators it appeared that there was no probability of the assets of the company, including all calls which could be made on past as well as present members of the company, being sufficient to pay the creditors in full; and, moreover, that without resorting to the past members there was not, in the liquidator's judgment, any probability of paying more than 4*s.* in the pound upon the debts contracted by the company before the Appellants transferred their shares. There was also evidence to shew that *Ball* and *Banks* were not likely to be able to pay the calls upon the shares which had been transferred to them.

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Everitt*, for Mr. *Bridger*:—

The transferor of shares, which are afterwards forfeited in the hands of the transferee, cannot be made a contributory at all. A past member can only be made liable as a surety for the present member, who is primarily liable in respect of the shares on which the claim is made; and therefore, unless there be some one who can be made liable as a present member, no past member can be made liable in respect of the shares. The 4th clause of sect. 38 of the *Companies Act*, 1862, shews that the shares on which a claim can be made against a past member must be shares upon which

something was payable, and unpaid, when the winding-up commenced, and what is so payable and unpaid may be recovered from the past member. The calls, however, which were made upon the transferees before the winding-up are debts due from them, and cannot be made the debts of the transferors. If the company had purchased the shares, how could the person who transferred to them be made liable as a past member in case the company were wound up within a year? There is no contract between the creditors of the company and the shareholders; the contract is only with the company: *In re Reese River Silver Mining Company, Smith's Case* (1). The creditors can only claim to be paid out of the assets of the company, including what the company have a right to bring into the assets. It is true that the House of Lords, in *Oakes* v. *Turquand* (2), decided that a shareholder who had been induced by fraud to become a member of the company was liable to the creditors where he had not repudiated his shares before the winding-up commenced. But there the fraud was a secret one, of which the creditors could have no notice; whereas the company's articles of association are registered, and the creditors must be taken to have notice of their provisions. If it were possible to make any one liable as a past member in respect of a forfeited share, the first person to be reached in that character would be the person in whose hands it was forfeited. But by reason of the forfeiture the forfeited shares cease to be contributory shares: *Stocken's Case* (3); *Dawes' Case* (4). The forfeiture was really equivalent to payment or satisfaction of all that was then uncalled on the forfeited shares.

Mr. *Maule*, Q.C., and Mr. *Fischer*, for Mr. *Neill*:—

The forfeiture extinguished the forfeited shares, and it became impossible to reach the persons who were liable in the second degree: *Beresford's Case* (5); *Woollaston's Case* (6).

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the liquidators, were not called upon.

(1) Law Rep. 2 Ch. 604.
(2) Ibid. 2 H. L. 325.
(3) Ibid. 3 Ch. 412.
(4) Law Rep. 6 Eq. 232.
(5) 3 De G. & Sm. 175; 2 Mac. & G. 197.
(6) 4 De G. & J. 437.

L. JJ. 1869

BRIDGER'S CASE AND NEILL'S CASE.

SIR C. J. SELWYN, L.J.:—

The facts in each of these appeal motions are substantially the same, and they both raise the same question, that is, as to the liability of certain persons who have executed transfers of their shares to be put upon the list of contributories in the character of past members of the company. All the transactions in question took place within the limit of one year before the commencement of the winding-up. It appears that the transfers were made in the early part of the year 1866, and two calls were subsequently made upon all the shareholders in this company. Those calls were unpaid by the transferees of the shares now in question, and in consequence of those calls remaining unpaid, the directors, in pursuance of the authority given to them by the articles of association, declared a forfeiture of the shares. We have, therefore, not to consider at all the question raised by the first clause of the 38th section of the Act, which declares that "no past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up." Nor on the evidence are we called upon to consider the question as to the liability of a past member in respect of debts contracted after the time at which he ceased to be a member. We take it that each of the present Appellants was, at the time of the transfer of his shares, liable to the creditors of the company for debts or liabilities contracted before the time of such transfer and still unpaid.

Under these circumstances, the company having been ordered to be wound up on the 3rd of November, 1866, two lists have been made out, and no question at present arises with respect to list A. The question is, whether the present Appellants are liable to be put on the list B. as past members. It has been contended before us that, inasmuch as the shares, in respect of which the Appellants are now sought to be put on the list, have ceased to exist by reason of the forfeiture, the liability of the present Appellants as past members has also ceased. In the first place, however, there was, as is admitted by the argument, on the part of each of these Appellants at the time of his transfer, an existing liability to the then creditors of the company, and the question we have to determine is, whether that then existing liability has been put an end

to? The words of the statute are, in my judgment, clear and conclusive on the point. Omitting the words which do not relate to past members, the 38th sections runs thus: "Every past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." Every past member is, therefore, declared to be liable, as he was in truth previously liable, to contribute to the debts and liabilities of the company subject to the qualifications which are afterwards mentioned. I need not refer again to the first two, but it is said in the 3rd clause of sect. 38, that "no past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act." We have not now to deal with that, because we are not considering the *quantum* of any call, but merely the question whether the Appellants are liable in the abstract; that is, whether they ought to be put on the list. The question mainly turns on the 4th clause, which declares that "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." It is said that as the shares which the Appellants formerly held no longer exist by reason of the forfeiture, therefore the 4th clause is equivalent to a declaration that the liability of the Appellants has ceased. The 4th clause is, however, confined to the case of a company limited by shares, and therefore, in the case of every other company, it is clear that the forfeiture would not have the effect contended for by the present Appellants.

The argument of the Appellants has gone to this length, that if, in the exercise of their judgment, the directors thought fit (of course without fraud) to purchase *bonâ fide* one-half of the shares in the company, the antecedent liability of the past members would be reduced to that extent. I am assuming that there was a liability to creditors existing before the date of the transfer, and then a transfer and a purchase by the company of the shares so transferred. There are no words in this Act of Parliament that can give any colour to an argument of that kind. The shares in respect of which that liability of a past member arises are not the

L. JJ. 1869

BRIDGER'S CASE AND NEILL'S CASE.

shares existing at the date of the winding-up, but shares in respect of which he is liable as a past member. What are they but the shares which he held as past member, which were his shares at the time the liability arose? The words of the Act appear to me simply to confine the liability to the amount unpaid on the shares, and I think the argument pressed on us might have gone further, and if it had been shewn that any sum had been paid from any source, either by a call, or a payment by any person more immediately liable in respect of these shares, it might have been contended that the payment so made would go in diminution of the liability of the Appellants; but no such payment has in fact been made. There is nothing in the Act of Parliament which says, that because there is a power in the directors to purchase or forfeit shares, therefore forfeiture of any shares, or the purchase of any shares, shall be considered as payment on account of those shares. I think there is an express declaration of liability, and that this qualification does not extend to create any such exemption from that existing liability as has been contended for in case of the forfeiture of shares. It would be necessary to shew that something had been paid in respect of the shares, and as nothing has been paid, I think the liability of the past members to pay the debts and liabilities of the company continues, subject to the qualifications specified—that the debts and liabilities must be debts and liabilities incurred before the time when they ceased to be members, and that it shall appear to the Court that the existing members cannot satisfy the contributions required to be made by them, and that the amount of liability does not exceed the amount remaining unpaid on the shares.

We have been much pressed with the authority of the judgment of Lord *Cairns* in *Stocken's Case* (1). It appears to me that that case has no application to the present; it did not relate to a liability such as arises here. The question there was only, whether interest on certain calls unpaid at the date of the winding-up order could be enforced as against a person who had by forfeiture of his shares ceased to be a member of the company.

I think, therefore, that the Vice-Chancellor has arrived at a

(1) Law Rep. 3 Ch. 412.

proper conclusion in this case, and that these appeal motions must be refused with costs.

SIR G. M. GIFFARD, L.J.:—

In this case no doubt the articles of association of the company and the statute must both be taken into consideration. The effect of the articles, coupled with the transaction which has taken place, is that the shares were forfeited and extinguished antecedently to the winding-up, but within a period of one year before that time. On turning to the 38th section of the Act, we find that that section in the first place enacts a liability as regards all past and present members in the most unqualified terms, and if there were no subsequent qualifications, it would seem that they would be liable as members of an ordinary partnership. Then certain qualifications are mentioned, of which the first three apply to members of an unlimited company. No one of the arguments which were deduced from the 4th clause could be applied to any one of those three qualifications, nor can I for one moment imagine that it could be contended that, as regards past members in an unlimited company, you must at the date of the winding-up have an existing share and a present shareholder. I can see no ground for that. The whole argument, therefore, turns upon the 4th clause of sect. 38. The 4th clause to my mind has simply this object: that whereas in ordinary companies there is an unlimited liability, in limited companies the liability shall not extend beyond the amount not paid in respect of the shares, and if we take the very words of that clause they mean that and nothing more. The "amount, if any, unpaid" is the amount, if any, which has not been paid, and I am clearly of opinion that forfeiture is not payment. The 5th clause further bears out the construction which I have put on the 4th. I think, therefore, these appeal motions ought to be refused with costs.

Solicitors: Messrs. *Tilleard & Co.*; Messrs. *Lewis, Munns, & Co.*

L. JJ.
1869
Jan. 14, 21, 30.

In re GENERAL ESTATES COMPANY.

HASTIE'S CASE.

Company—Contributory—Bankrupt Shareholder—Discharge before Winding-up—Liability for future Calls—Bankruptcy Act, 1861, *s.* 154—*Companies Act*, 1862, *ss.* 75, 77.

A shareholder in a company became bankrupt, and obtained his discharge. Afterwards the company was wound up voluntarily. The assignees repudiated the shares and they remained in the name of the bankrupt. At the time of the bankruptcy no calls were due, and no future calls were proved in the bankruptcy, nor was there anything to shew that they were capable of valuation at the date of the bankruptcy :—

Held (affirming the decree of the Master of the Rolls), that the bankrupt remained liable to the future calls and must be put on the list of contributories.

Martin's Patent Anchor Company v. *Morton* (1) commented on.

THIS was an appeal from an order of the Master of the Rolls, refusing to remove the name of Mr. *Hastie* from the list of contributories of the *General Estates Company, Limited*. The case is reported (2).

The material facts were as follows:—The company was formed and registered in July, 1865, under the *Companies Act*, 1862. Mr. *Hastie* became one of the original shareholders for 125 shares, on each of which £2 had been paid.

In April, 1866, Mr. *Hastie* became bankrupt, and on the 5th of July, 1866, he obtained his discharge, his estate having been fully administered and wound up. The creditors' assignees refused to have anything to do with the shares, and Mr. *Hastie's* name remained on the register.

After the bankruptcy the company was wound up voluntarily, and the winding-up was continued under the supervision of the Court. The liquidator placed Mr. *Hastie's* name on the list of contributories for 125 shares, on each of which £18 remained due, and the Master of the Rolls refused to remove his name. From this decision Mr. *Hastie* appealed.

The question mainly depended upon the construction of sect.

(1) Law Rep. 3 Q. B. 306. (2) Law Rep. 7 Eq. 3.

154 of the *Bankruptcy Act*, 1861 (1), and sects. 75 and 77 of the *Companies Act*, 1862 (2).

Mr. *Jessel*, Q.C., and Mr. *Fischer*, for the Appellant:—

The Appellant is released from all liability by his discharge under his bankruptcy. The liability to future calls is a present debt payable at a future time; it is like a covenant to pay on demand. It could, therefore, have been proved in his bankruptcy. The case on which the Master of the Rolls mainly relied was *Martin's Patent Anchor Company* v. *Morton* (3). In that case the Judges admitted that it would be too narrow a construction to confine sect. 75 of the *Companies Act*, 1862, to a bankruptcy after the winding-up; but they shrank from the legitimate conclusion of that admission, and held that it only applied to a bankruptcy before the winding-up, where there remained assets of the bankruptcy undistributed at the time when the winding-up commenced.

(1) Sect. 154 of the *Bankruptcy Act*, 1861, is as follows:—

"If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise; and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained."

(2) The sections of the *Companies Act*, 1862, referred to are as follow:—

Sect. 75. "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

Sect. 77. "If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets, in due course of law, any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up; and for the purposes of this section any person who may have taken the benefit of any Act for the relief of insolvent debtors before the 11th day of October, 1861, shall be deemed to have become bankrupt."

(3) Law Rep. 3 Q. B. 306.

L. JJ. 1869 HASTIE'S CASE.

No such limitation can be found in the Act. A bankruptcy may go on for years, and in almost every case there are some assets which remain for a long period undistributed. The only reasonable construction is, that the section applies to all bankruptcies, whether before or after the winding-up, provided, of course, the bankrupt was a shareholder at the time of his bankruptcy. This construction is placed beyond doubt by the last clause of sect. 77, which provides, that for the purposes of that section a person who became insolvent before October, 1861, is to be deemed to have become bankrupt. As the Act was not passed till 1862, this clause would be unmeaning unless the section applied to previous bankruptcies. There is no inherent power in the assignees to elect whether they will take the shares of the bankrupt or not, and no such power is given them by the *Companies Act*, 1862. If there were a surplus after the winding-up, the assignees would be entitled to the bankrupt's share of it; they must be equally bound to assume his liability.

[They referred to *Ex parte Nicholas* (1); *Williams* v. *Harding* (2); *Ex parte Canwell* (3); *Chapple's Case* (4); *Greenshield's Case* (5); *Kuper's Case* (6); *Parbury's Case* (7); *Luard's Case* (8); *Sadler's Case* (9); *Ex parte King* (10).]

Mr. *Roxburgh*, Q.C., and Mr. *Edmund James*, for the liquidator:—

The present case is governed by *Martin's Patent Anchor Company* v. *Morton* (11); and the judgment of the Queen's Bench is entirely consistent with the true construction of the statute. The real question is, whether the calls made in this winding-up were a debt proveable in the Appellant's bankruptcy, for the discharge only applies to debts proveable under the bankruptcy? When the bankruptcy occurred the company was a going concern, and no calls had been made; and it would have been impossible for the company to prove against his estate in respect of future possible

(1) 2 D. M. & G. 271.
(2) Law Rep. 1 H. L. 9.
(3) 12 W. R. 698; 33 L. J. (Bky.) 20.
(4) 5 De G. & Sm. 400.
(5) Ibid. 599.
(6) 3 De G. & Sm. 113.
(7) 3 D. F. & J. 80.
(8) 1 Ibid. 533.
(9) 3 De G. & Sm. 36.
(10) Law Rep. 4 Eq. 566; 3 Ch. 10.
(11) Law Rep. 3 Q. B. 306.

calls, under the 154th section of the *Bankruptcy Act*, 1861, for their value could not be ascertained. Therefore, the bankrupt's discharge could not affect his liability for future calls. There is no power to place the assignees upon the list of contributories without their consent; and, on the other hand, if they repudiate the shares, and they turn out valuable, the Court would not compel the bankrupt to give them up.

[They cited *South Staffordshire Railway Company* v. *Burnside* (1); *General Discount Company* v. *Stokes* (2).]

Mr. *Fischer*, in reply.

Jan. 30. SIR G. M. GIFFARD, L.J., now delivered the judgment of the Court. After stating the facts of the case, as mentioned above, His Lordship continued:—

The Master of the Rolls founded his judgment for the most part on the case of *Martin's Patent Anchor Company* v. *Morton* (3). In the argument before us exceptions were taken to the judgments both of the Master of the Rolls, and of the learned Judges of the Court of Queen's Bench in the case referred to; and it was also urged, among other arguments, that taking the *Bankruptcy Act* and the *Companies Act* together, there was a distinct legislative enactment that calls under a winding-up should be proved and proveable whether the bankruptcy took place before or after the winding-up. As a ground for this, the latter part of the 77th section of the *Companies Act* was much relied upon. The whole of that section is as follows:—[His Lordship read the section, and continued:—] The argument on this section was, that as it applied in terms and words to an insolvency before the Act, it necessarily applied to a bankruptcy preceding the winding-up; and the observations on the judgment of the Master of the Rolls and the judgments of the learned Judges of the Court of Queen's Bench were to the effect that they were erroneous in attempting to escape the result of this by laying it down that though proof

(1) 5 Ex. 129.
(2) 17 C. B. (N.S.) 765.
(3) Law Rep. 3 Q. B. 306.

L. JJ. 1869 — HASTIE'S CASE.

might be made notwithstanding the bankruptcy preceded the winding-up, this could only be done before the assets were distributed and the bankrupt's estate wound up. We think there is great force in that argument; but that may well be admitted without leading to the conclusion that Mr. *Hastie's* name ought not to be on the list of contributories; for, without laying down a general rule that the 77th section applies to every bankruptcy, there may be circumstances under which the bankruptcy may precede the winding-up, and the 77th section be applicable. It would be applicable if the assignees chose to take to the shares; it would be applicable to such calls as were made before the bankruptcy, as, for instance, if the directors called up the whole or part of the capital, and their calls were not met; again, it would be applicable if, for any reasons or under any circumstances, the calls, or any of them, were capable of valuation at the date of the bankruptcy.

Then the cases of *Williams* v. *Harding* (1), and *Ex parte Canwell* (2), were referred to; but they result in this, and nothing more: viz., that the debt has its inception at the date of, and originates with, the membership; but it does not follow that a debt or liability is proveable under a bankruptcy because it had its inception before, or originated in, a contract preceding the bankruptcy. Lastly, the cases of *Ex parte Nicholas* (3), *Parbury's Case* (4), both in the Court of Appeal, and *Chapple's Case* (5), and *Greenshield's Case* (6), were brought forward, and it was urged that these cases are inconsistent with the decisions both of the Master of the Rolls and of the Court of Queen's Bench, as well as with the *South Staffordshire Railway Company* v. *Burnside* (7), and the *General Discount Company* v. *Stokes* (8). In the two cases in the Court of Appeal the winding-up preceded the bankruptcy or insolvency. All the cases had reference to the old *Winding-up Act*, and proceeded very much upon this—viz., that the liabilities for payment of which the calls were made were barred, and that, as the proceedings under the Winding-up Acts were a substitution for a suit for contribution between partners, and had no other

(1) Law Rep. 1 H. L. 9.
(2) 12 W. R. 698; 33 L. J. (Bkcy.) 26.
(3) 2 D. M. & G. 271.
(4) 3 D. F. & J. 80.
(5) 5 De G. & Sm. 400.
(6) Ibid. 599.
(7) 5 Ex. 129.
(8) 17 C. B. (N.S.) 765.

effect, it followed that the liabilities being barred, the calls were barred; and further, that a certificate would have been a defence to a suit for contribution. This reasoning does not apply to proceedings under the Act of 1862.

In this case the shares continued, and still continue, vested in Mr. *Hastie*. There are no provisions in the *Bankruptcy Act* analogous to those which have reference to a bankrupt's liability on leaseholds where the assignees repudiate the lease. It is essential for proof, under the 154th section of the *Bankruptcy Act*, that the debt to be proved should be a debt capable of valuation at the date of the bankruptcy. The provisions of the Act of 1862 do not make a debt proveable which is incapable of valuation at the date of the bankruptcy; nor can such a construction be in reason put upon them as would have the effect of relieving a bankrupt in consequence of his discharge, though he should have been discharged years before the winding-up, and might have been holding the shares, and even receiving dividends, subsequently to his discharge. There is nothing in this case to shew that the debt or call in respect of which the bankrupt is made a contributory was capable of valuation at the date of his bankruptcy. *Primâ facie* undoubtedly it would not be so; and as the bankrupt is discharged only from debts proveable under his bankruptcy, and those debts only are proveable which were capable of valuation at the date of the bankruptcy, we are of opinion that he must be retained as a contributory.

This case is of importance, and we have gone into it at some length; but for its actual decision it is enough to say that a bankrupt must be retained as a contributory where the bankruptcy and the discharge precede the winding-up, where the debt is not shewn to be capable of valuation, where the assignees have repudiated the shares, and they have always remained, and still remain, vested in the bankrupt.

The appeal motion will be refused with costs.

Solicitors for the Appellant: Messrs. *Tatham & Sons.*
Solicitors for the Liquidator: Messrs. *Treherne & Wolferstan.*

L. JJ.
1869
Jan. 22.

Ex parte NORRIS. *In re* BIDDULPH.

Breach of Trust—Improper Investment—Acquiescence—Unknown Cestui que Trust—Joint and several Debt.

A lady died in 1830, leaving a will by which she gave her personal estate in trust for her sister for life, with remainder to her three trustees and executors, to all appearance beneficially. She also left a codicil, by which she impressed the residue with trusts in favour of other persons after the death of the tenant for life. This codicil was not proved till 1841, but the trustees in the meantime appeared to regard the property as not belonging to themselves, though it was not shewn that they knew of the existence of the codicil. In 1834 the trustees invested part of the estate on an improper security. Two of the trustees were partners in the bank out of which the money was drawn to place it on this security. In 1840 the firm became bankrupt, and after this the security turned out insufficient. The tenant for life died in 1842:—

Held (reversing the decision of the Commissioner), that the persons claiming under the codicil were entitled to prove against the separate estate of one of the bankrupt trustees for the loss occasioned by the improper investment.

THIS was an appeal from a decision of Mr. Commissioner *Holroyd* refusing to admit a proof against the separate estate of *A. G. W. Biddulph.*

The Countess *de Front*, by will dated the 19th of February, 1824, appointed *W. V. Fryer*, *A. G. W. Biddulph* (then called *A. G. Wright*), and *John Wright*, her executors, and devised to them her real estate in trust for sale, the proceeds to be deemed part of her personal estate. After bequeathing certain legacies, she gave the residue of her personal estate to the same trustees, "to be invested or continued by them in the public funds or at interest; the stocks, funds, and securities to be varied at discretion." She then directed her trustees out of the income to pay a certain life annuity, and subject thereto to pay the income to her sister *Sarah Neve* for life, and after her death to pay another life annuity and certain legacies, and subject to the above dispositions the testatrix gave "all the residue of my estate to the said *W. V. Fryer*, *A. G. Wright*, and *J. Wright*, absolutely."

The testatrix made eight codicils to her will, the last of which, dated the 20th of April, 1824, was as follows:—"To the Rev. *V. Fryer*, *A. G. Wright*, and *John Wright*, executors to the will of *Mary Winifred*, Countess *St. Front*. Gentlemen, whereas by my last will and testament I have bequeathed to you the residue of my personal estate, now I do hereby declare that I have bequeathed the same to you in trust only, and not for your own use and benefit. I direct that you pay in the first place any sum of money which I desire to be paid by some private memorandums in my handwriting, and in the next place that you pay one moiety of the residue to the Catholic Bishop for the time being of the *London* district, the Vicar-General of the same district, the President of *St. Edmund's College*, and to *John Gage*, Esq., of *Lincoln's Inn;* and the other moiety to the Catholic Bishop for the time being of the Midland district, and the Vicar-General of the same district, the President of *St. Mary's College*, *Oscott*, and the said *John Gage*, Esq."

The testatrix died on the 7th of January, 1830, and her will and seven of the codicils, not including that of the 20th of April, 1824, were proved by the executors in February, 1830.

The executors kept a banking account with the bankrupts, who carried on business under the firm of *Wright & Co.*, *Biddulph* and *Wright*, two of the executors, being two of the partners, and *E. W. Jerningham* another.

In 1834, *Wright & Co.* advanced £15,000 to Sir *G. Duckett* to enable him to purchase the equity of redemption of the navigation of the river *Stort*, and on the 8th of May, 1834, Sir *G. Duckett* conveyed the equity of redemption to *John Wright*, *E. W. Jerningham*, Sir *G. Duckett*, and *F. Giles*, for securing the repayment of the £15,000 to *Wright* and *Jerningham*, the prior mortgages being for £40,000 and £5000.

£3000, part of this £15,000, was advanced by the Countess *de Front's* trustees out of the moneys standing to their account with *Wright & Co.*, and by a deed-poll dated the 31st of May, 1836, under the hands and seals of *Wright* and *Jerningham*, after reciting that the £15,000 was not their own proper moneys, but belonged to the persons thereinafter named in the proportions thereinafter mentioned, that was to say, "the sum of £3000, part

L. JJ. 1869 *Ex parte* NORRIS. *In re* BIDDULPH.

thereof, belongs to and is the proper money of *A. G. W. Biddulph*, the said *J. Wright*, and the Rev. Dr. *Fryer*, as trustees under the will of the late Countess *de Front* deceased," and that £5000, other part thereof, belonged to *P. Campbell*, and £7000, the residue thereof, to the executor of *A. Wright* deceased, *Wright* and *Jerningham* declared that they would stand possessed of the £15,000 "as to the sum of £3000, part of the said sum of £15,000, and the interest thereof, in trust for the said *A. G. W. Biddulph*, *J. Wright*, and the Rev. Dr. *Fryer*, as trustees of the said will of the said Countess *de Front*, and in priority to the £5000 next mentioned."

On the 17th of December, 1840, *Wright & Co.* became bankrupt.

Shortly before this, on the 13th of December, 1840, *Biddulph* wrote to Mr. *Norris* his solicitor: "This letter must be considered most private, with permission to shew it to the Bishop if advisable to do so, and likewise to Dr. *Fryer* as an interested party as executor and trustee and legatee jointly with my brother and myself to the Countess *de Front*. My brother and Dr. *Fryer* have always acted in the trust, in which I have never interfered, and know not how the trust stands as to deposits or moneys owing to it in *Henrietta Street*, further than that I owe it £2500, which I borrowed when this house was building, by my brother and, I believe, Dr. *Fryer's* consent, and deeply do I regret not having paid it off, which I might have done long ago. Having been with my brother (and I think Dr. *Fryer*) left residuary legatees with £100 each beyond it, the latter named sum I took, but of the residue I never touched a stiver. Now, in declaring my debts, it would probably raise a question what debts, as joint executor and trustee and residuary legatee, have been cancelled, and what remains for you still to fulfil, and what residue comes to your share? This is a very ticklish question to answer, and before you insert it in my schedule you had better see the Bishop, it having at the time the will was made been a trust Catholic under the rose. Ask Mr. *Tierney* about it, and he will very probably accompany you to the Bishop's and Dr. *Fryer's*."

Dr. *Fryer* proved against the joint estate of *Wright & Co.* for the moneys in their hands belonging to the estate of the Countess;

the £3000 invested on the security of May, 1834, not being included in the amount of proof.

The codicil of the 20th of April, 1824, was proved on the 1st of October, 1841. Dr. *Fryer* and *John Wright* on that occasion made a joint affidavit stating that they did not know of the existence of the codicil till about three months before that time, and that, as they believed, it had all along been in *Gage's* custody. *Biddulph* made a separate affidavit, in which he went no further than to say that the codicil had come to his knowledge since the will was proved.

The tenant for life, *Sarah Neve*, died on the 22nd of September, 1842.

The security of the 8th of May, 1834, was ultimately realized by suit in 1854, and proved insufficient to satisfy the £3000 by £1819 16*s.* 3*d.*, the amount now sought to be proved.

John Wright survived his co-executors, and in 1855 his executor, as the personal representative of the Countess *de Front*, applied to prove against the separate estate of *Jerningham* for the £1819 16*s.* 3*d.*, on the ground that the loss had been occasioned by a breach of trust, in which *Jerningham* had concurred. The proof was allowed by the Commissioner, but was expunged by the Lords Justices (1) on the ground that *Jerningham*, having no notice of the codicil, could not be held to have received the trust money in such circumstances as to be liable for breach of trust, the transaction having the sanction of the persons appearing entitled under the will and earlier codicils.

The present legal personal representative and trustees of the Countess now applied to prove against the separate estate of *Biddulph*, which proof was rejected by Mr. Commissioner *Holroyd*, who considered that the judgment of the Lords Justices in the former case governed the present.

Mr. *De Gex*, Q.C., and Mr. *Ramadge*, for the Appellants:—

The Commissioner was in error in treating this case as governed by the decision of this Court in the case of *Jerningham*, who was neither executor nor legatee. Our right to have some refunding is clear: *Anon.* (2); *Edwards* v. *Freeman* (3); *Todd* v. *Studholme* (4);

(1) 6 D. M. & G. 801.
(2) 1 P. Wms. 495.
(3) 2 P. Wms. 447.
(4) 3 K. & J. 324.

L. JJ. 1869 *Ex parte* NORRIS. *In re* BIDDULPH.

Davies v. *Nicolson* (1); and we have lost no right by resorting to the improper security, for we had a lien on it: *Mant* v. *Leith* (2). We must at all events be allowed to prove in respect of the one-third bequeathed to *Biddulph*, but we claim a right to prove in respect of the whole, on the ground that there was a breach of trust, in respect of which the executors were jointly and severally liable.

Mr. *Amphlett*, Q.C., and Mr. *Elderton*, for the assignees :—

The trustees, when they advanced this money, had no notice of the trusts of the eighth codicil, and they made the investment with the consent of all the supposed *cestuis que trust*, or if not with that of the tenant for life, her death makes that immaterial. A transaction thus sanctioned cannot be impeached by persons claiming under an instrument of which none of the parties had notice at the time of the transaction. The Appellants have recognised and taken the benefit of the investment, and are precluded from treating it as a breach of trust if they could otherwise have done so. The case is one in which the Appellants ought to be put to file a bill.

SIR C. J. SELWYN, L.J.:—

This is an appeal from an order of the Commissioner disallowing a proof. It appears that a lady named the Countess *de Front* made her will, dated in 1824, that she subsequently made eight codicils, and that she died on the 7th of January, 1830. The will, with the first seven codicils, was proved shortly after her death; but the eighth codicil, which has given rise to the present controversy, was not proved until the 1st of October, 1841. In the meantime the bankruptcy had taken place, viz., on the 17th of December, 1840.

By the will, after creating a tenancy for life, the testatrix gave the residue of her property to her three executors, and apparently for their own benefit; but by the eighth codicil, which, as I have already stated, was not proved until the 1st of October, 1841, she says, "I do hereby declare that I have bequeathed the same to you in trust only, and not for your own use and benefit." The matter being in this position, it appears that in the year 1834 the execu-

(1) 2 De G. & J. 693. (2) 15 Beav. 524.

tors advanced a sum of £3000, on a security given on the 8th of May, 1834, for securing sums amounting to £15,000—a security which, it is admitted, was not authorized either by the trusts of this particular will, or by the general rules of the Court. It is admitted that under ordinary circumstances this would have been a breach of trust, and that under ordinary circumstances the claim against trustees for a breach of trust is in the nature of a joint and several demand.

The first question, therefore, that appears to be material is in what manner the executors dealt with this trust fund. No doubt, if it could be shewn that they, with the consent of all the persons interested, had divided the trust fund under some mistaken notion of their rights, if it had been separated and dealt with otherwise than as a trust fund, and divided amongst different individuals, then entirely different considerations would arise. But it appears that throughout the whole of these transactions, down to the time of the bankruptcy, there had always been joint possession of this fund, and it always had been dealt with as a trust fund, as, in point of fact, it was. Now the money having been advanced, as I have stated, on the security of the 8th of May, 1834, it appears that a deed-poll was executed on the 31st of May, 1836, declaring the ownership of the different sums of money which were included in the security. This deed-poll contains an express declaration, by way of recital, that the £3000 belonged to, and was the proper money of, *Biddulph*, *Wright*, and *Fryer*, as trustees under the will of the late Countess *de Front*, and in the operative part of the same instrument there is a declaration of trust exactly in accordance with the recital. It appears, therefore, that so late as the month of May, 1836, these persons were dealing with this fund as being a trust fund held by them upon the trusts of the will of the Countess *de Front*. I think, therefore, that as nothing was done with the trust fund from that time down to the bankruptcy, it becomes immaterial to consider precisely whether they, or any of them, had or had not notice at that time of the eighth codicil, because it being a trust fund, and it being admitted by them to be such, and it being dealt with by them as such, the burthen is cast on them of shewing that when they committed what they are obliged now to admit was under ordinary circumstances a breach of trust, they had the

L. JJ. 1869 *Ex parte* NORRIS. *In re* BIDDULPH.

assent of all persons whose consent was necessary to legalize their act. It is their misfortune that they had not obtained that consent, because, as it now appears, the persons who were entitled to stand in the position of *cestuis que trust*, either primarily or ultimately, in respect of that trust fund, were the persons who under the eighth codicil were interested in the estate of the Countess *de Front* after the death of the tenant for life. It appears that the tenant for life lived until 1842, that is, until after the bankruptcy, and therefore the trust was obviously subsisting down to that time. Under those circumstances the present Appellants come here asking for leave to prove in respect of this trust fund, saying that the investment was an improper one; but that they are entitled to follow the trust money into the investments if they can trace it, and having received as much as can be realized from the proceeds of the sale of that improper investment, to prove against the estate of each trustee for the difference. I think that they are so entitled. I think that the trustees have failed to prove that which was necessary to establish their contention, viz., that that which would under ordinary circumstances have been a breach of trust, was sanctioned and authorized by persons capable of giving such sanction and authority. It follows, therefore, that the proof ought to have been allowed. It is then said that even if a *primâ facie* case has been established, yet, considering the lapse of time and the great complication of circumstances, a bill ought to be ordered to be filed, and that this proof ought not to be allowed in the meantime; but inasmuch as the Court of Bankruptcy is a Court of Law and Equity, and as these facts were within the cognizance of Mr. *Biddulph*, and as there has been no difficulty in ascertaining or proving any part of the facts of this case, and as there has been a full opportunity given to the parties to bring forward any evidence they might think fit, I think it would be incurring unnecessary expense if we were now to say that this proof should be postponed until after a bill has been filed.

I think a case has been established for allowing the proof, and that consequently the order of the Commissioner must be reversed. The proof will be allowed, but there will be no costs of the appeal —the deposit will be returned.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that the proof should be allowed against Mr. *Biddulph's* separate estate. The original transaction was simply a loan, and there was security taken for it which was worthless, or nearly worthless. Of course such a transaction as that by trustees would in an ordinary case be a breach of trust, and would in an ordinary case create a joint and several liability. I do not think it less a breach of trust because it has happened that the persons entitled under the trusts were not known. It may be that under certain circumstances ignorance of facts may excuse that which in itself is a breach of trust; as, for instance, if there had been on the face of the seventh codicil some third party entitled, and the money had been paid over to the third party in ignorance of the existence of the eighth codicil. But in this case these persons have done nothing of the sort, and not only so, but it cannot be said that they ever acted at any time in the belief that this money was their own or proceeded upon that footing. That being so, first of all there was a breach of trust; and, secondly, there was no excuse for it. Under these circumstances, therefore, I think there is a clear case for proof against the separate estate, and I see no reason why it should stand over for a bill to be filed.

Solicitors: Messrs. *Norris & Sons;* Messrs. *Few & Co.*

L. C.

1869

Feb. 1.

WITHINGTON *v.* TATE.

Mortgage—Transfer without Notice—Payment by Mortgagor to a Solicitor not authorized by Mortgagee—Negligence—Foreclosure.

11 Eq 306, 310
16 L.T. D184-7

N. & T., who were mortgagees, transferred their mortgage to the Plaintiff, who gave no notice to the mortgagors. Afterwards the mortgagors, intending to redeem, paid the amount secured by the mortgage to the solicitors of *N. & T.* without ascertaining that they were authorized to receive it; the solicitors misappropriated the money. *N. & T.* executed a deed prepared by their solicitors, but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, and purported to convey the property by the direction of the mortgagors to their nominees. There was no proper receipt indorsed on the deed. The Plaintiff filed a bill of foreclosure against the mortgagors:—

Held (affirming the decree of the Master of the Rolls), that the Plaintiff was entitled to the usual foreclosure decree.

THIS was an appeal from a decree of the Master of the Rolls.

By an indenture of the 7th of July, 1858, certain lands, with a chapel and other buildings, were mortgaged by the Defendants to *H. Nixon & H. Thew*, to secure the repayment of £1400 and interest.

By an indenture of the 1st of January, 1864, *Nixon & Thew* assigned the mortgage debt and conveyed the mortgaged property, subject to the existing equity of redemption, to the Plaintiff.

Messrs. *Stockley & Wrigley* were the solicitors of *Nixon & Thew*, and received for them the interest from the mortgagors. They were also the Plaintiff's solicitors, who, on taking the transfer, allowed them to retain in their possession the title deeds of the property, and received the interest through their hands.

No notice was given by the Plaintiff or his solicitors to the mortgagors of the transfer of the 1st of January, 1864.

In August, 1864, the mortgagors being desirous of redeeming the mortgage, which they supposed to be still vested in *Nixon & Thew*, paid the sum of £1400, with the interest due thereon, to *Stockley & Wrigley*, assuming that they were authorized by *Nixon & Thew* to receive the principal money as well as interest. The money paid by the mortgagors never came into the hands either of *Nixon & Thew* or of the Plaintiff, having, as they afterwards discovered, been misappropriated by *Stockley*, one of the partners in the firm of solicitors, who subsequently absconded.

Shortly afterwards *Stockley & Wrigley* prepared a deed to which *Nixon & Thew* were parties, and which they executed, as was alleged, without perusing the same, under the impression that its object was to perfect the Plaintiff's title.

The deed was dated the 31st of December, 1864, and was made between *Nixon & Thew* of the first part, the mortgagors of the second part, and certain persons who were nominees of the Defendants of the third and fourth parts, and after reciting the mortgage to *Nixon & Thew*, and reciting as follows, "And whereas the parties hereto of the second part did, on the 15th of August, 1864, repay to the said *H. Nixon & H. Thew* all principal, interest, and other moneys due to them and secured by the indenture of mortgage, as they do hereby testify and declare;" it witnessed that *Nixon & Thew*, at the request and by the direction of the mortgagors, conveyed the mortgaged premises to the use of the persons parties thereto of the fourth part, freed from the mortgage, and the deed contained a covenant by *Nixon & Thew* against their own incumbrances. There was no indorsement on the deed of the receipt of the money.

The bill was filed by the Plaintiff as assignee of the mortgage against the mortgagors; it alleged that the payment by the Defendants of the sum of £1400 to *Stockley & Wrigley* was an unauthorized payment, and that the Plaintiff was entitled as mortgagee to receive the same or to have the Defendants foreclosed, and prayed for the usual foreclosure decree. *Nixon & Thew* were not made parties to the suit.

The Defendants submitted that the payment of the sum in question was good as between them and *Nixon & Thew*, and that as the Plaintiff had neglected to give notice to the mortgagors of the transfer to himself, the said payment was as against himself, as well as against *Nixon & Thew*, to be treated in full satisfaction of the mortgage.

The Master of the Rolls granted the relief prayed, and from this decision the Defendants appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Bagshawe*, for the Appellants:—

Assuming the money paid by the Defendants to *Stockley & Wrigley* to have been a good payment to *Nixon & Thew*, it was

L. C. 1869

WITHINGTON v. TATE.

good as against the Plaintiff, for where a mortgage is assigned and the assignee fails to give notice to the mortgagor, payments subsequently made to the original mortgagee are valid as against the assignee: *Matthews* v. *Wallwyn* (1); *Williams* v. *Sorrell* (2); *Norrish* v. *Marshall* (3).

But we contend that the Defendants were fairly entitled to assume that *Stockley & Wrigley* were the proper persons to receive the mortgage money as agents for the mortgagees, especially as they had regularly received the interest on their behalf, which was a circumstance calculated to throw the mortgagors off their guard. Further, if negligence is to be attributed to the Defendants in making the payment without proper inquiry, still greater negligence was shewn by the Plaintiff in not giving notice to the mortgagors of the assignment of the mortgage, and if this was occasioned by the neglect of *Stockley & Wrigley*, who were solicitors to him as well as to the first mortgagees, he must be held answerable for it, as in *Hopgood* v. *Ernest* (4).

If the assignees of a mortgage fail to give notice of the transfer to the mortgagor, the mortgagor is thereby authorized to deal with the original creditor as if he were still the creditor, and whatever is equivalent to payment as between the mortgagor and the original mortgagee binds the assignee, although the original mortgagee be no party to a suit for foreclosure: *Ex parte Monro* (5); *Stocks* v. *Dobson* (6).

The Plaintiff was not only guilty of laches in not giving notice to the mortgagors, but in not taking possession of the title deeds. The Master of the Rolls admitted that he was guilty of laches, but has given no effect to that laches. We contend that the laches of the assignee of a mortgage not only postpones him to some of the equities existing between the mortgagors and the first mortgagees, but to all of such equities.

As regards the deed of the 31st of December, the recital that the money was paid is an acknowledgment by *Nixon & Thew*, who executed the deed, which would debar them from recovering it from the Defendants. The Plaintiff cannot be in a better position, and,

(1) 4 Ves. 118.
(2) Ibid. 389.
(3) 5 Madd. 475.
(4) 3 D. J. & S. 116.
(5) Buck, 300.
(6) 4 D. M. & G. 11.

17 Jur 539.

even if he is in form entitled to a decree for foreclosure, there should be a direction that in taking the accounts the Plaintiff should be charged with the sum paid by the mortgagors to the persons whom they were entitled to assume were the agents of the mortgagees.

Mr. *Southgate*, Q.C., and Mr. *Robinson*, for the Plaintiff, were not called on.

LORD HATHERLEY, L.C.:—

I am of opinion that the transferee of the mortgage is entitled to a decree. The only question is as to the equities between the mortgagors and the transferee of the mortgage, arising out of the payment made by the mortgagors without notice of the transfer. The peculiarity of this case is, that the same persons were solicitors for *Nixon & Thew* and for the Plaintiff. In this state of things they receive the interest from the mortgagors, and remit it to *Nixon & Thew*, and whatever was so paid was a good payment. But they were not authorized to receive the principal money. However, when the mortgage was transferred to the Plaintiff, they did in fact receive the money from the Plaintiff, and by this *Nixon & Thew* were paid off. After that they received the interest for the Plaintiff, and it found its way to his hands. The next thing that happened was, that the solicitors received a notice from the mortgagors to pay off the mortgage, which was addressed to them as the solicitors of *Nixon & Thew*. It is clear that the Plaintiff could be in no way affected by the notice. The solicitors received the money because the mortgagors were ill-advised enough to pay it to them. But they so paid it in their own wrong, for they were not authorized to pay it to the solicitors. Then the solicitors prepared a new deed, and introduced a recital that the money had been paid to *Nixon & Thew*. It was true that *Nixon & Thew* had been paid off, although not in the way the mortgagors supposed. The mortgagors did not communicate with *Nixon & Thew*. If they had done so, they must have heard something which would have led them to a knowledge of the transfer to the Plaintiff. But instead of that they went to the solicitors and made them their agents for the purpose of paying *Nixon & Thew*. They now con-

L. C. 1869 WITHINGTON v. TATE.

tend that *Nixon & Thew* have misled them by executing an instrument which put them off their guard. I cannot see that any equity arises out of that against the transferee. Mr. *Bagshawe* argued that this would not have occurred except through the laches of the transferee, but I think the mortgagors have been guilty of more laches. If they had dealt with *Nixon & Thew* themselves they would have discovered what had taken place. The money has not been lost through *Nixon & Thew's* default, or through the Plaintiff's default, but entirely by the mortgagors' own fault. I think the Master of the Rolls was right, and the appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Bateson, Robinson, & Morris, Liverpool.*

Solicitors for the Defendants: Messrs. *Handcock & Co.*, agents for Mr. *J. Hawksford, Wolverhampton.*

L. C. 1869 *Jan.* 29.

MOXON *v.* BRIGHT.

Agent—Account—Equity.

A patentee agreed with a machine maker, that the machine maker should make machines according to the patent and sell them, taking a certain sum upon each machine for himself, and paying to the patentee as a royalty the amount charged for the machines above that sum:—

Held, that the patentee could not maintain a suit in equity for an account against the machine maker as agent.

In one case the machine maker received a sum of money for the patentee:—

Held, that this was not sufficient to support the suit, and that the patentee's remedy was at law.

Decree of *Giffard*, V.C., affirmed.

THE Plaintiffs in this case were owners of a patent for carpet looms, and in 1862 entered into an agreement with the Defendant *Hall*, of the firm of *Tuer & Hall*, that if Messrs. *Tuer & Hall* would make and exhibit a loom the Plaintiffs would allow them one-tenth of the royalty which the Plaintiffs might receive on looms sent on the Continent; and further, that Messrs. *Tuer & Hall* might make and sell looms on which the royalty should be not more than £20.

and Messrs. *Tuer & Hall's* charges should be not more than £45, making the total charge for the loom £65. By a subsequent agreement, the Plaintiffs allowed Messrs. *Tuer & Hall* the sole right of making the looms at a royalty of £30 per loom. The agreement seemed also to have been varied verbally, and there was some conflict of evidence on the subject; but Messrs. *Tuer & Hall* had made and sold looms, and had paid considerable sums of money to the Plaintiffs. In some cases they appeared to have obtained, with the consent of the Plaintiffs, more than £65 for a loom, and to have accounted to the Plaintiffs for the surplus, and in one case they seemed to have acted as agents for the Plaintiffs, and to have collected a sum due to the Plaintiffs from one *Stodhart* for royalty on the number of yards of carpet manufactured.

In September 1865, the Plaintiffs filed the bill in this suit against the Defendant *Hall*, the surviving partner of Messrs. *Tuer & Hall*, praying for an account and payment by him of all sums received by him to the use of the Plaintiffs, and of all sums due to the Plaintiffs in respect of the sales and licenses, and other property of the Plaintiffs in connexion therewith. The bill also sought to make other Defendants accountable for using the Plaintiffs' looms.

Hall, by his answer, alleged that he had duly accounted and paid, and set forth his accounts, but submitted that he was not liable to account in this suit. In one affidavit, however, he called himself agent for the Plaintiffs.

The Vice-Chancellor *Giffard* dismissed the bill with costs, without prejudice to an action at law, and without prejudice to a suit in equity by the Plaintiffs, founded upon their rights as patentees of their alleged patent.

The Plaintiffs appealed.

Mr. *J. H. Palmer*, Q.C., and Mr. *Hastings*, for the Plaintiffs:—

We say that *Hall* was our agent, and has sent us imperfect accounts; he has supplied goods for us, and must give us discovery and an account. An agent cannot file a bill against his principal without some special ground, but a principal can always file a bill against his agent: *Makepeace* v. *Rogers* (1). It is true that if only one article has been sold, a Court of Equity will not encourage

(1) 34 L. J. (Ch.) 396. 11 Jur. N.S. 215, 314
4 De G. J. & S. 649

L. C. 1869

MOXON v. BRIGHT.

such a suit, but still the principal has a right to an account: *Mackenzie* v. *Johnston* (1).

Mr. *Kay*, Q.C., and Mr. *Hadley*, for *Hall*, contended that the agreement only amounted to a license. Except perhaps in one case, *Hall* did not receive any money for the Plaintiffs, and was only bound to pay them a certain sum for each loom sold, so that there was no mutual account, and the Plaintiffs' remedy, if any, was at law: *Phillips* v. *Phillips* (2); *Kernot* v. *Potter* (3).

Mr. *Druce*, Q.C., and Mr. *Hemming*, for the other Defendants, against whom the Plaintiffs also sought an account, were not called upon.

Mr. *J. H. Palmer*, in reply.

LORD HATHERLEY, L.C., said, that there was no case at all against the other Defendants, but as against *Hall* there was some difficulty in the question. There were numerous cases shewing that where the relation of principal and agent had imposed a trust upon the agent, the Court would entertain a bill for an account, and the only difficulty was in determining what constituted this species of trust. It was not every agent who held a fiduciary position as between himself and his principal. *Foley* v. *Hill* (4) shewed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. Nor did the mere circumstance that the principal wanted discovery empower the Court to give him assistance in the way of relief. The case of *Smith* v. *Leveaux* (5), shewed that though you might be entitled to discovery, which you could get either in equity or at law, that did not entitle you to relief, for all depended upon the character of the agency. As between master and servant such an agency did not exist, and the Vice-Chancellor *Knight Bruce*, in *Smith* v. *Leveaux*, expressed his opinion that a Court of Equity ought not to entertain a suit in such a case.

His Lordship then commented on the evidence, and said that

(1) 4 Madd. 374.
(2) 9 Hare, 471.
(3) 3 D. F. & J. 447.
(4) 1 Ph. 399; 2 H. L. C. 28.
(5) 2 D. J. & S. 1.

the agreement between the Plaintiffs and Messrs. *Tuer & Hall* had varied at different times, but the principal agreement was not that *Tuer & Hall* should act as agents for the Plaintiffs, and collect £20 upon each loom for the Plaintiffs, but that *Tuer & Hall* should take the debt upon themselves, selling the looms for £65, and paying £20 out of it to the Plaintiffs, receiving besides the commission of 10 per cent. It was true that Messrs. *Tuer & Hall* were bound to consult the Plaintiffs as to the sums charged for the looms, and that Mr. *Hall*, in one of his affidavits, did say that he acted as agent for the Plaintiffs, but His Lordship did not rely much on that, for everyone who did anything for another, was an agent, but was not therefore necessarily accountable in equity, as a banker, for instance. Even where *Tuer & Hall* obtained more than £20 as royalty, though they were accountable to the Plaintiffs for what they had so received, it did not appear that they told the purchasers that they were to pay a royalty to the Plaintiffs, but said merely that the charge for the machines would be a certain sum, so much for the machine itself, and so much for the royalty.

Though the terms between the parties were altered from time to time, the sole point in this suit was whether there existed between them an agency in which a fiduciary position was created, and looking at the whole case, though *Tuer & Hall* might never get more than £45 for a machine, and had to pay over all they received above that sum, this was too slender a foundation for a suit to compel an account. In fact, this would not be a matter of agency, but of special agreement in each case, and the case could not be brought within the principle upon which the Court had directed accounts. In *Navulshaw* v. *Brownrigg* (1), Lord *St. Leonards* said that a single case of agency would not be sufficient, as the matter might be determined at law, and this shewed the principle on which the Court acts in these cases. From *Stodhart* alone they seemed to have collected money due to the Plaintiffs, and to have paid it over to them, but that was not sufficient to justify the Court in directing an account. The appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *F. Andrew.*
Solicitor for the Defendants: Mr. *E. Worthington.*

(1) 2 D. M. & G. 441, 459.

L. C.
1869
Jan. 19.

CRAVEN *v.* BRADY.

Forfeiture Clause—Forfeiture by Marriage—Cesser of Life Estate—Acceleration of Remainder.

A testator appointed, under a general power, real estate, and devised other real estate to his wife and her assigns during her life, and after her death to his son, with a proviso that if his wife should "do, make, or execute any deed, matter, or thing whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." By a codicil he gave his personal estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement:—

Held (affirming the decision of the Master of the Rolls), that notwithstanding the limitation to her and "her assigns," and the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; and that the remainder both in the appointed and devised estates was accelerated.

THIS was an appeal from a decision of the Master of the Rolls. The case is reported (1). The facts were as follows:—

Jeremiah Dyson, by his will, dated the 3rd of December, 1855, appointed real estate over which he had a general power of appointment, and devised all his real estates to his wife, *Augusta Dyson*, and her assigns, for her life, and from and immediately after her decease to his son *Arthur Dyson* in fee, with executory limitations over in the event of his son dying under twenty-one without leaving issue. The will contained a proviso that in case his said wife should sell, release, or charge her said life estate in the said real estates, or should do, make, or execute any deed, matter, or thing whereby, or by means whereof, she should be deprived of the rents and profits of the same, or the power or right to receive, or control over the same, so that her receipt alone should not at all times be a good and sufficient discharge for the same, then her life estate and interest should cease and determine as fully and effectually as it would by her actual decease.

By a codicil the testator revoked the appointment and devise to *Arthur Dyson* in fee, and in lieu thereof appointed and devised the

(1) Law Rep. 4 Eq. 209.

estates after the death of his wife to *Arthur Dyson* for life, with remainders over, and appointed *Dacre Craven* jointly with his wife guardian and trustee of and for his children. By a second codicil he gave his residuary personal estate to *Dacre Craven* in trust to pay the income to his wife for her life, for her "separate and inalienable use and benefit, independently of any future husband," without power of anticipation, and so that her receipt alone should be a sufficient discharge for such income.

The testator died in February, 1861. In August, 1866, the widow married *Charles Brady*, and no settlement of her property was made. *Dacre Craven* thereupon instituted this suit in his own name and in the name of *Arthur Dyson* (who was an infant), against Mr. and Mrs. *Brady* and the persons entitled to the real estate in remainder, for a declaration of the true effect of the will as to the real estate in the events which had happened, and for an account of the rents, and for directions for the maintenance of the infant Plaintiff thereout.

The Master of the Rolls was of opinion that Mrs. *Brady* had forfeited her life estate by her marriage, and that the remainder both in the appointed and the devised estates was accelerated. From this decision Mr. and Mrs. *Brady* appealed.

Mr. *Kay*, Q.C., and Mr. *Macnaghten*, for the Appellants:—

The condition against alienation annexed to an estate given to a person "and his assigns," is repugnant and void, and a proviso for forfeiture without a gift over is void. In the present case there is no gift over, for the first codicil revoked the gift over contained in the will, and relimited the estate after Mrs. *Brady's* death without reviving the gift over on the forfeiture of her estate: *Rochford* v. *Hackman* (1). But we rely upon the evident intention of the testator appearing in his will and codicils, for he makes no mention of marriage in the proviso against alienation, and from the second codicil it is clear that he contemplated her second marriage. We also contend that if the life estate is forfeited the remainder is not accelerated, at all events in the case of the appointed estates, and the persons entitled in default of appointment ought to be made parties to the suit.

(1) 9 Hare, 475.

L. C. 1869 CRAVEN v. BRADY.

Sir *R. Baggallay,* Q.C., and Mr. *Cookson,* for the Plaintiffs, and Mr. *Wingfield,* for the other Defendants, were not called on.

LORD HATHERLEY, L.C.:—

I cannot entertain any doubt in this case. The lady has been misled, not sufficiently attending to the limitation contained in the will. She has married, and no settlement having been made to her separate use her husband has become entitled to receive the rents of the property; her receipt is of no avail, and she is deprived of the control of the property; everything, in a word, which the testator wished to guard against has happened. He knew that she might marry, but what he wished to avoid was her marrying in such a way that her husband should have the power of squandering her income.

It used to be argued, in former times, that an execution not being an act of the debtor was not an assignment within the meaning of a clause of forfeiture, and consequently careful conveyancers introduced other words to include all acts, not actual assignments, by reason of which the property would pass out of the control of the person intended to be benefited. And in the present case I must hold that, although not by actual assignment, this lady has so disposed of the income of the property by marrying that she has violated the condition under which it was given.

The fact of the income being given to her "and her assigns," does not, in my opinion, affect the question. I am inclined to think that an assignment by her to trustees for her own protection would not have been a forfeiture, provided she had declared that her receipts should be a sufficient discharge. But it is argued that the testator shews an intention that his widow should not forfeit the income of his real estate, in case of her marriage, by the terms of the gift of his residuary personal estate in the codicil, in which he expressly refers to the event of her marrying again. I do not think that this throws any doubt upon the conclusion to which I have come—for neither in the gift of his real nor of his personal estate does he shew any desire to deprive his wife of her power of marrying again, but he does shew an anxious desire that she shall retain the control over her income. This would have

been satisfied by an agreement by her husband before her marriage that the income should be held for her separate use.

As regards the first codicil, I have no doubt that, as in the case of *Rochford* v. *Hackman* (1), which has been referred to, the remainders both in the appointed and devised estates are accelerated by the forfeiture. In the codicil the testator recites the old limitations, and then he wipes out the limitations after his wife's death and substitutes others. The new limitations must be read as if they had been inserted in the original will.

On the whole case, I am of opinion that the appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Norris & Allen.*
Solicitor for the Defendants: Mr. *Beck.*

(1) 9 Hare, 475.

L. JJ.
1869
Jan. 25.

WHITE *v.* SPRINGETT.

Will—Construction—Next of Kin according to the Statute of Distributions, exclusive of A.

12 L.D. 821

A testator gave his estate to such of his three grandchildren, *S.*, *M.*, and *E.*, as should survive their father and attain twenty-five, but in case two only of them should die in the lifetime of their father or under twenty-five, and the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess should go to the person or persons, exclusive of the surviving grandchild, who, under the Statute of Distributions, would immediately on the decease of the survivor of the other two grandchildren be entitled to the testator's personal estate if he had then died intestate.

S. and *E.* died under twenty-five, *E.* being the survivor of the two, and at her death *M.* was the sole next of kin of the testator, supposing him to have died at that time:—

Held (affirming the decision of the Master of the Rolls), that the persons who at the death of *E.* would have been the next of kin of the testator if *M.* also had then been dead, were entitled to file a bill for the administration of his estate.

THIS was an appeal from a decision of the Master of the Rolls.

Richard White, by his will, dated the 11th of May, 1852, gave, devised, and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and investment, and to stand possessed of the trust funds upon trust for all and every his three grandchildren, *Sarah Maria Hills*, *Mary Jane Hills*, and *Ellen Hills*, who should survive their father, *Robert Hills*, and should attain the age of twenty-five years, equally to be divided between them, if more than one, as tenants in common; and in case only one of his said grandchildren should survive her said father, and should attain the age of twenty-five years, then the whole to be in trust for such one of his said grandchildren; and in case none of his said grandchildren should survive her said father and should attain the age of twenty-five years, then upon trust for the person or persons who immediately after the decease of the survivor of his said three grandchildren would, under the statute for the distribution of the personal estates of intestates, be entitled to the testator's personal estate in case he had at such time died intestate, and, if more than one, in the shares in which they would be entitled to such personal estate.

The will contained this further proviso—"Provided also, and I hereby further declare, that in case two only of my said three grandchildren shall depart this life in the lifetime of their said father or under the age of twenty-five years, and the amount of my property to which the survivor of my said three grandchildren would thereupon become entitled shall exceed in amount or value the sum of £10,000, then so much thereof as shall exceed that amount or value shall be held in trust for the person or persons, exclusive of my surviving grandchild, who under the said statute for the distribution of the personal estates of intestates would immediately after the decease of the survivor of my other two grandchildren be entitled to my personal estate in case I had at such time died intestate."

The testator died on the 21st of May, 1864, and his will was proved on the 26th of July, 1864.

Sarah Maria Hills died on the 30th of July, 1865, a spinster, and under the age of twenty-five.

Ellen Hills died on the 12th of September, 1867, also a spinster, and under the age of twenty-five.

Mary Jane Hills attained twenty-one in September, 1865, and on the 1st of August, 1866, she married *Philip Augustus Eagles.*

Robert Hills, the father of the three grandchildren, died in the testator's lifetime.

Mrs. *Eagles* would have been the sole next of kin of the testator according to the statute if he had died immediately after the death of *Ellen Hills.*

The residue of the testator's estate considerably exceeded the sum of £10,000.

This suit was instituted for the administration of the testator's estate. The Plaintiffs claimed to be the persons who would at the death of *Ellen Hills* have been the next of kin of the testator according to the statute if he had died immediately after the death of *Ellen Hills,* and Mrs. *Eagles* had been then dead. The Defendants were the surviving executor and trustee of the will, and Mr. and Mrs. *Eagles,* and the trustees of their marriage settlement.

The Master of the Rolls on the hearing of the cause on the 13th of July, 1868, made the common administration decree, with the addition of an inquiry who were the person or persons, exclu-

L. JJ. 1869 WHITE v. SPRINGETT.

sive of the Defendant Mrs. *Eagles*, who, under the statute, would immediately after the decease of *Ellen Hills* be entitled to the testator's personal estate in case he had at such time died intestate.

Mr. and Mrs. *Eagles* appealed.

Mr. *Jessel*, Q.C., and Mr. *Casson*, for the Appellants :—

The Plaintiffs have no title to file the bill. The words "exclusive of *A.*" mean the same thing as "except *A.*" The gift is to all the members of a class except Mrs. *Eagles;* in the events which have happened she is the only member of that class, and she being excepted there is no such class. The gift, therefore, fails, and there is an intestacy, under which Mrs. *Eagles* must take the whole of what is undisposed of by the testator: *Bullock* v. *Downes* (1); *Withy* v. *Mangles* (2); *Milne* v. *Gilbart* (3); *Lee* v. *Lee* (4); *Johnson* v. *Johnson* (5).

Mr. *Southgate*, Q.C., and Mr. *Villiers*, for the Plaintiffs, were not called on.

Mr. *G. W. Collins*, for the executors.

SIR C. J. SELWYN, L.J.:—

I accede to the argument on behalf of the Appellants to this extent, that the current of modern decisions, and especially those in the House of Lords, has set strongly in favour of adhering strictly to the literal meaning of the words used by the testator in each case, without alteration or addition, and, as far as possible, without reference to other cases or other wills. I also agree that, in the particular event which has been referred to, viz., of the two grandchildren who died first having left children, there might have been at the death of the second of those two grandchildren a class of surviving children composed of the children of the two deceased grandchildren, and the children of the living grandchild. But I think, having made those admissions, and adhering to the cases which have been decided, and especially those in the House

(1) 9 H. L. C. 1.
(2) 10 Cl. & F. 215.
(3) 5 D. M. & G. 510.
(4) 1 Dr. & Sm. 85.
(5) 4 Beav. 318.

of Lords, the conclusion at which we must arrive is the same as that to which the Master of the Rolls has come. For it is to be observed that the testator, in the clause under discussion, has not said that where you have a class entitled to certain shares as next of kin one particular person is to be excluded from a share in a fund so to be derived; but what he has said is, that you are to look for an artificial class created by himself. They are not his next of kin according to the statute, because they would be the next of kin at the time of his death; but he creates for himself an arbitrary class, to be ascertained in a particular manner, and the question of the persons who are to constitute that class is what we have to look to. It is true he adopts the statute as one of the means by which that class is to be arrived at, but it is an arbitrary class created by himself, applying the statute to a particular time in order to arrive at that particular class of persons, and without any reference to any division of the estate, or any exclusion of a particular person from taking a share. He says you are to ascertain the persons excluding his surviving grandchild. In considering who are the artificial class you are to exclude from your consideration the surviving grandchild. Adopting those words, ascertaining this class of persons, and excluding from your consideration the surviving grandchild according to this arbitrary rule, in that case the statute would make the present Plaintiffs the persons constituting the class. I think, therefore, that they were entitled to file the bill, that the decree was correct, and that the appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that the Plaintiffs answer the description contained in the testator's will, of the "person or persons, exclusive of my surviving grandchild, who, under the said statute for the distribution of personal estates of intestates, would immediately after the decease of the survivor of my other two grandchildren be entitled to my personal estate in case I had at such time died intestate." I have no doubt that the object of these words is to exclude *Withy* v. *Mangles* (1), and *Bullock* v. *Downes* (2), because clearly, if these words had not been in the will, this particular

(1) 10 Cl. & F. 215. (2) 9 H. L. C. 1.

L. JJ. 1869 WHITE v. SPRINGETT.

grandchild would have taken. What the testator meant was this:—I mean my next of kin; but what I mean by that is, my next of kin exclusive of my one surviving grandchild; that is, I do mean those who are my next of kin to take, but I do not mean the surviving grandchild to take. Putting it in other words, it is this:—Putting my surviving grandchild out of consideration as being at that time my sole or one of my next of kin, ascertain who, excluding her, my next of kin are.

It was suggested as a very conclusive argument that there might have been the children of the two deceased grandchildren, and the children of this actually living grandchild. I confess I do not think that there is anything in that argument; and for this reason:—It is quite clear that the children of the two dead grandchildren would have taken, because they would be next of kin; it is equally clear that the children of the living grandchild would not have taken, for they would not have been the next of kin while their parent was alive. Putting that construction upon the will, the whole thing is consistent. In my judgment, we should be going directly against the intention of the testator if we came to any other conclusion than that at which the Master of the Rolls has arrived.

The appeal must be dismissed with costs.

Solicitors: Messrs. *Parker, Lee, & Haddock;* Messrs. *Monckton & Monckton;* Mr. *E. S. Cavell.*

L. JJ. 1869 *Jan.* 26.

BLACKFORD *v.* DAVIS.

Mortgagor and Mortgagee—Account—Just Allowances.

A mortgage deed provided that it should be a security not only for the principal sums advanced, and interest, but also for the costs of preparing the deed, and for all costs which might be incurred by the mortgagee in selling the property, or in any actions or suits relating to it. The mortgagor filed a bill to redeem, and a decree was made directing an account of what was due to the Defendant for principal and interest under the mortgage deed, and an account of sale-moneys, rents, and profits received by the Defendant. In taking the accounts the Defendant carried in a claim for costs incurred in legal

proceedings relating to the property, which the Chief Clerk refused to entertain, and the Defendant then appealed from the decree:—

Held, by *Selwyn*, L.J., that the decree was right, for that all costs properly incurred in the actions might be claimed under it as "just allowances":—

Held, by *Giffard*, L.J., that the costs might be claimed under the decree as principal moneys due under the deed.

Decree of *Stuart*, V.C., affirmed.

7 Ch D 19
14 Ch D 53
374

THIS was an appeal from a decree of Vice-Chancellor *Stuart*.

The bill was filed for redemption of a property of which the Defendant was mortgagee in possession under an indenture dated the 5th of April, 1865, by which real and personal estate were conveyed and assigned to the Defendant, subject to a proviso for redemption if the mortgagor should on demand pay to the Defendant the sum of £600, with interest at £5 per cent. per annum, and also all other sum or sums of money which the Defendant should thereafter lend and advance to the mortgagor, or pay to or for his use, or in which the mortgagor might thereafter become indebted to the Defendant, with interest thereon after the rate aforesaid. In case of default a power of sale was given to the Defendant, his heirs, executors, administrators, or assigns, to sell the mortgaged property; and it was declared that he and they should stand possessed of the proceeds upon trust to pay all expenses attending the sale, or the bringing or defending any action or suit at law or in equity that might be or become necessary, or thought expedient, for carrying the trusts thereby created into execution; and in the next place, to retain the £600 and interest, and all other sums as aforesaid, in which the mortgagor might become indebted to the Defendant, with interest as aforesaid, and all and every other the moneys thereby secured, and all expenses incurred by reason of any provision therein contained, and pay the residue (if any) to the mortgagor, his heirs, executors, administrators, or assigns. And it was declared that the deed should be a security not only for the £600 and other sums and interest as aforesaid, but also for the costs of preparing and executing the indenture and all other costs and charges connected with any sale or sales, assignment or assignments, action or actions, suit or suits at law or in equity, under the trusts, powers, and provisions thereinbefore contained, or in anywise connected therewith. It was declared that the total moneys recoverable should not exceed £1200.

L. JJ.
1869
BLACKFORD
v.
DAVIS.

The bill alleged the receipt of divers sums of money by the Defendant from sales and otherwise under the mortgage deed, and prayed that an account might be taken of the estate, property, moneys and effects received or paid by or to the Defendant, or any person or persons on his behalf, or by or for his order or use, under or by virtue of the said indenture of the 5th of April, 1865; and that if the Defendant had received more than was due to him he might be decreed to pay the balance, the Plaintiffs offering to pay any balance found due to him.

By decree dated the 17th of December, 1866, it was ordered that an account should be taken of what was "due to the Defendant for principal and interest under the indenture of the 5th of April, 1865, in the pleadings mentioned," and an account of the sale-moneys, rents, and profits received by the Defendant, or by any other person, &c., or which without his wilful neglect might have been received, and it was ordered that what the Defendant should have so received should be applied, first in discharging the interest, and then in sinking the principal secured by the said indenture. Further consideration was adjourned, with liberty to apply.

The Defendant carried into Chambers an account in which he claimed the costs incurred by him in two actions relating to the property, in one of which he was the Plaintiff and in the other the Defendant. The Chief Clerk, it was stated, refused to enter into consideration of these items as not coming within the scope of the decree.

The Defendant thereupon presented his Petition of appeal, seeking to vary the decree by the insertion of an inquiry whether anything and what was due to the Defendant for any and what costs, charges, and expenses secured to him by the mortgage deed beyond his costs in this cause, and for a direction to apply the moneys received in payment of them before applying them in sinking the principal of the mortgage moneys.

Mr. *Little*, Q.C., and Mr. *Bardswell*, for the Appellant:—

It appears not to be the practice to allow costs of other proceedings unless they are mentioned in the order. They cannot be claimed under the head of just allowances. The decree should be

varied by directing an account of what is due for legal expenses in defending the property, and the costs of the suit should be expressly reserved: *Smith* v. *Green* (1); *Seton* on Decrees (2); *Harmer* v. *Priestly* (3); *Seton* on Decrees (4). As the decree stands its terms are inconsistent with making to the Defendant these allowances.

Mr. *Mackeson*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff, were not called upon.

SIR C. J. SELWYN, L.J.:—

In this case it is to be regretted that the matter should be brought before the Court of Appeal merely upon a question of form, and before the real substance of what is in controversy between the parties has been decided by the learned Vice-Chancellor.

The bill in this case proceeds upon the footing of the indenture of the 5th of April, 1865, and the first paragraph of the prayer of the bill is, that an account may be taken under the direction of the Court of the estate, property, and effects, possessed, received, or paid by or to *Michael Davis*, or any person by his order, under or by virtue of the indenture. The Defendant, in like manner, relies upon the provisions of that deed, and says that he is entitled to have all such charges and expenses allowed in taking the accounts as are stipulated for under the provisions of that deed.

The matter then came before the Vice-Chancellor, and the decree is not made in the ordinary form, but is made with a distinct reference to the deed insisted upon by the Plaintiff in his bill as the foundation of the relief which he seeks, and also insisted upon by the Defendant in his answer. The decree first directs an account of what is due to the Defendant for principal and interest under the indenture of the 5th of April, 1865, in the pleadings mentioned.

Now this decree, which is subsequent to the General Order in respect to "just allowances" (Cons. Ord. XXIII., rule 16), must be read as if there had been inserted a direction that in taking that account all just allowances should be made. Then what is a "just

(1) 1 Coll. 555, 564.
(2) Page 396.
(3) 16 Beav. 569.
(4) Page 462.

L. JJ. 1869 BLACKFORD v. DAVIS.

allowance," having regard both to the special form of this decree and the mode of taking the account? It appears to me that this question must necessarily be answered by reference to the deed which is the foundation of the Plaintiff's case. The substantial question is, whether, having regard to that contract so insisted upon and so enforced, any particular sums are to be included as proper to be allowed to the Defendant; and I think that if the Defendant can make out that under the provisions of this deed he is entitled to have any such sum allowed to him in taking the account, then, having regard to this decree and to the terms of the deed, those would necessarily be just allowances, and consequently ought to be allowed. I think, therefore, so far as that point is concerned, this appeal is either premature or altogether misconceived.

Then, with respect to the other point, as to the making these allowances being inconsistent with the terms in which the decree directs the accounts, it appears to me that there is no difficulty but what must necessarily arise in every case where just allowances are made. Assuming that an allowance is a just allowance, and proper to be taken into account, it must be set of course against the sum which has been received, amounting, in fact, to a diminution of the sum so received. I think it is of the greatest importance to adhere as far as possible to the common forms of decree. They have been found after long experience to work well in practice, and I think they ought to be followed where they apply to the circumstances of the case. I think that here, having regard to the pleadings, and especially to the form of the decree, full justice will be done to the Defendant by leaving the decree as it stands, as, in my judgment, it leaves open his right to claim in taking the account the sums to which he alleges himself to be entitled.

SIR G. M. GIFFARD, L.J.:—

If I thought that this decree would not give the Appellant that for which he has stipulated by this mortgage deed, I should undoubtedly have been of opinion that it ought to have been altered, but I think that it will do so, for its terms are—that there shall be an account of what is due to him for principal and interest under the indenture of the 5th of April, 1865. If we turn to the last

provision of the indenture, it is there provided that the same "shall be a security not only for the said sum of £600 and other sums and interest as aforesaid, but also for the costs of preparing and executing these presents, and all other costs and charges connected with any sale or sales, assignment or assignments, action or actions, suit or suits at law or in equity, under the trusts, powers, and provisions thereinbefore contained, or in anywise connected therewith." Then we have this proviso: "That the total moneys to be secured by and ultimately recoverable under these presents shall not exceed the sum of £1200." What are those total moneys? They include not only the £600 and further advances, but all those costs which, according to the previous stipulations of the deed, are to be included in the security.

That being so, I think the terms of this decree, regard being had to the bill and to the answer, clearly include all these items. I say that no one of them ought to be excluded if the facts warrant their inclusion—the terms of the decree include them, since every one of those items forms a sum due for principal under the indenture.

Solicitors: Mr. *Charles Hooper*; Mr. *H. C. Barker*.

BEAUMONT *v.* OLIVEIRA.

9 *Geo.* 2, *c.* 36—*Charity—Royal Society—Direction to pay Charitable Legacies out of Pure Personalty.*

A testator, after giving several legacies, gave a legacy of £4000 to the *Royal Society*, £4000 to the *Royal Geographical Society*, and three other sums of £4000 to three other institutions, directed that all his charitable legacies should be paid out of his pure personalty, and bequeathed the residue of his property to the Plaintiffs, his executors, for their own use. The object of the *Royal Society* is "for improving natural knowledge," that of the *Royal Geographical Society* "the improvement and diffusion of geographical knowledge." The testator left pure personalty very much less than the amount of charitable legacies, a larger sum of mixed personalty, and a small real estate in *Madeira*:—

Held (affirming the decision of *Stuart*, V.C.), that the *Royal Society* and the *Royal Geographical Society* were charitable institutions within the meaning of 9 Geo. 2, c. 36:

Held (varying the decision of the Vice-Chancellor), that the debts, fune-

L. JJ.
1869
BEAUMONT
v.
OLIVEIRA.

ral and testamentary expenses, and costs of suit, ought not to be thrown upon the mixed personalty in exoneration of the pure personalty, but ought to be apportioned rateably between the two funds. That the charities should then be paid out of the residue of the pure personalty so far as it would extend, and claim for the residue against the rest of the estate, such claim abating in the proportion which the mixed personalty bore to the proceeds of sale of the *Madeira* estate.

THIS case came before the Court on two petitions of appeal against an order made by Vice-Chancellor *Stuart* on the second further consideration of the cause (1). The suit was for the administration of the estate of *Benjamin Oliveira*, who, by his will, dated the 11th of September, 1865, after appointing the Plaintiffs executors, and giving a legacy of £2000 to his daughter *Emma*, and certain other legacies, and an annuity, bequeathed "to the treasurer for the time being of the *Royal Society* the sum of £4000," and in similar terms he bequeathed legacies of the same amount to the *Royal Geographical Society*, the *Royal Humane Society*, the *Marylebone School for Girls*, and the *Albert Orphan Asylum*, in all five sums of £4000 each, and added, "I direct all the said charitable legacies to be paid out of my pure personal estate." The testator gave the residue of his real and personal estate to the Plaintiffs, his executors, for their own use. The decree directed the usual accounts and inquiries, including an inquiry what real estate there was and where situate. The Chief Clerk certified that the pure personalty was £6711, that certain leasehold property had realized £8045, and that the only real estate was a small one in the island of *Madeira*, which had been sold with the sanction of the Court, and was represented by a sum of £866 12*s.* 6*d.* £3 per Cent. Bank Annuities.

By the order under appeal it was declared that the several legacies to the five societies mentioned were given for charitable purposes within the meaning of the statute of 9 Geo. 2, called the *Mortmain Act*, and that they were payable out of the testator's personal estate in no wise connected with any interest in land, in precedence to any payment thereout of the debts, funeral and testamentary expenses of the said testator, and the other legacies given by his will, and the costs of this suit; and it was also declared that the sum of £866 12*s.* 6*d.* £3 per Cent. Bank Annuities,

(1) Law Rep. 6 Eq. 534.

which represented the proceeds of the sale of the *Madeira* estate, was not such an interest in land as that a bequest thereof for charitable purposes was within the operation of the *Mortmain Act*, and that the same was to be dealt with as personal estate in no wise connected with any interest in real estate, and applied accordingly.

The first of the appeals was by the *Royal Geographical Society* and *Reginald Thistlethwaite Cox* their officer, and by the president, council, and fellows of the *Royal Society* of *London*, and the question raised by it was, whether the bequests of £4000 to each of the societies ought to have been declared to be legacies given for charitable purposes within the meaning of 9 Geo. 2, c. 36, and the Appellants also complained of the order because it gave the costs of the *Royal Geographical Society* and *Cox* only out of their share of the pure personalty, and gave no costs to the president, council, and fellows of the *Royal Society*.

The *Royal Geographical Society* is a corporation the objects of which, as defined by its constitution, are "the improvement and diffusion of geographical knowledge." The *Royal Society* is also a corporation, incorporated "for improving natural knowledge."

The second appeal was by the Plaintiffs, and raised the question in what way the debts, and funeral and testamentary expenses of the testator, and the costs of the suit, ought to be provided for, the Plaintiffs contending that the pure personalty ought to bear a *pro ratâ* share of them.

Mr. *Dickinson*, Q.C., Mr. *Archibald Smith*, and Mr. *Bagshawe*, for the *Royal Society* and the *Royal Geographical Society*, in support of their appeal:—

These institutions are not charitable: *Attorney-General* v. *Heelis* (1); *Thomson* v. *Shakespear* (2); *Whicker* v. *Hume* (3); *Morice* v. *Bishop of Durham* (4); *Mayor, &c., of Faversham* v. *Ryder* (5); *Denton* v. *Lord Manners* (6); *Jones* v. *Williams* (7); *Townley* v. *Bedwell* (8); *Carne* v. *Long* (9); *James* v. *Allen* (10);

(1) 2 S. & S. 67.
(2) 1 D. F. & J. 399.
(3) 7 H. L. C. 124.
(4) 9 Ves. 399; 10 Ves. 522.
(5) 5 D. M. & G. 350.
(6) 2 De G. & J. 675.
(7) Amb. 651.
(8) 6 Ves. 194.
(9) 2 D. F. & J. 75.
(10) 3 Mer. 17.

I. JJ. 1869 BEAUMONT v. OLIVEIRA.

Attorney-General v. *Mayor of Dublin* (1); *Trustees of British Museum* v. *White* (2); *Kendall* v. *Granger* (3); *Nightingale* v. *Goulburn* (4); *President of United States* v. *Drummond* (5).

Mr. *Greene*, Q.C., and Mr. *Davey*, for other societies.

Their Lordships, without calling on the other side, stated their opinion to be that the Appellant societies were charitable foundations, but deferred giving their reasons until they disposed of the other appeal.

Sir *Roundell Palmer*, Q.C., and Mr. *Langworthy*, for the Plaintiffs, in support of their appeal:—

The charitable legacies are not demonstrative legacies, and no case decides them to be so, though they have some similarity to the character of a demonstrative legacy. The authorities are against throwing the debts and costs exclusively on the mixed fund: *Philanthropic Society* v. *Kemp* (6); *Sturge* v. *Dimsdale* (7); *Robinson* v. *Geldard* (8); *Tempest* v. *Tempest* (9); *Hobson* v. *Blackburn* (10); *Davidson's* Conveyancing, "Wills" (11).

Mr. *Dickinson*, Q.C., Mr. *Archibald Smith*, and Mr. *Bagshawe*, for the *Royal Society* and the *Royal Geographical Society*:—

Tempest v. *Tempest* (12) is expressly in our favour, and the reversal (13) proceeded on the words of the will, which indicated an intention contrary to the view taken by the Vice-Chancellor. The principle of *Robinson* v. *Geldard* is, that these legacies are demonstrative legacies, and if they are, the costs and debts must, in their favour, be thrown on the other funds: *Williams'* Executors (14). *Philanthropic Society* v. *Kemp*, and *Sturge* v. *Dimsdale*, are distinguishable, owing to the special wording of the wills. The legacies are charged on all the property: *Greville*

(1) 1 Bli. (N.S.) 312.
(2) 2 S. & S. 594.
(3) 5 Beav. 300.
(4) 5 Hare, 484; 2 Ph. 594.
(5) Cited 7 H. L. C. 155.
(6) 4 Beav. 581.
(7) 6 Ibid. 462.
(8) 3 Mac. & G. 735.
(9) 7 D. M. & G. 470.
(10) 1 Keen, 273.
(11) Page 67.
(12) 2 K. & J. 635.
(13) 7 D. M. & G. 470.
(14) Page 1078, 6th Ed.

v. *Browne* (1); and therefore, so far as we are not paid out of pure personalty, we can come against the *Madeira* property, which can legally be given to charity, though we cannot support the view that it is pure personalty.

Mr. *Davey*, for the *Royal Humane Society*:—

These are demonstrative legacies: *Acton* v *Acton* (2).

The *Madeira* estate is pure personalty for the present purpose: *Noell* v. *Robinson* (3), referred to without disapprobation in *Williams'* Executors (4).

Mr. *A. Bailey*, for other charities:—

A gift in these terms to an individual would clearly be a demonstrative legacy, and it cannot make any difference that the legatee is a charitable body.

Mr. *Langworthy*, in reply:—

If the charities come upon the *Madeira* property under the charge of legacies, there must be an apportionment of the surplus of the charitable legacies between the *Madeira* property and the impure personalty, and so much as falls on the latter must fail. *Robinson* v. *Geldard* (5) does not lay down that such legacies as these are demonstrative legacies, but only that they have something in common with them. A direction that charitable legacies shall be paid out of pure personalty is really nothing more than a declaration that there shall be marshalling.

Jan. 21. SIR C. J. SELWYN, L.J., delivered the judgment of the Court as follows:—

The *Royal Geographical Society* is a corporation, and its objects are stated to be and are, "the improvement and diffusion of geographical knowledge." The *Royal Society* is also a corporation, and its objects are "for improving natural knowledge." The objects of both these societies are public, and they are both

(1) 7 H. L. C. 689. 5 Jan 1859 (3) 2 Ventr. 358.
(2) 1 Mer. 178. (4) Page 1539, 6th Ed.
(5) 3 Mac. & G. 735.

L. JJ. 1869

BEAUMONT v. OLIVEIRA.

societies for the advancement of objects of general public utility; and the Vice-Chancellor has referred to the judgment of Sir *John Leach*, in *Attorney-General* v. *Heelis* (1), in which he said: "I am of opinion that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal public or general purpose, are charitable gifts, to be administered by Courts of Equity." It was said by the counsel for the Appellants that Lord *Eldon*, in *Attorney-General* v. *Mayor of Dublin* (2), had expressed his dissent from the judgment of Sir *John Leach* in *Attorney-General* v. *Heelis*; but in the case of *Attorney-General* v. *Eastlake* (3) the present Lord Chancellor, when Vice-Chancellor, pointed out that this expression of dissent on the part of Lord *Eldon* related to a different part of the judgment of Sir *John Leach*. After stating (4) that the exception taken by Lord *Eldon* to the judgment in *Attorney-General* v. *Heelis* was, that the source from which the funds came is not material, as stated by Sir *John Leach*, but that the criterion is the purpose to which they are applied, and the question is whether that is a charity or not, he says: "It is sufficient to say it is a large and general purpose for this town, although not beyond the limits of the town." In the case of *Trustees of the British Museum* v. *White* (5), a devise to the *British Museum* was held to be within the statute of Geo. 2; and in the case of *President of the United States* v. *Drummond* (6) a gift of residue to found at *Washington*, under the name of the *Smithsonian Institute*, an establishment for the increase of knowledge among men, was sustained as being a charity.

In our judgment, the case of *Whicker* v. *Hume* (7) is in no degree inconsistent with these authorities, for the decision in that case, so far as relates to this point, cannot be taken as amounting to more than this—if the terms "advancement of learning" mean advancement of education the case is not an arguable one.

Again, the case of *Thomson* v. *Shakespear* (8), which was relied upon by the Appellants, was a case in which a legacy was given

(1) 2 S. & S. 67.
(2) 1 Bli. (N.S.) 312
(3) 11 Hare, 205.
(4) Ibid. 222.
(5) 2 S. & S. 594.
(6) Cited 7 H. L. C. 155.
(7) 7 H. L. C. 124.
(8) 1 D. F. & J. 399.

to be laid out by the testator's executors, with the concurrence of the persons described in the will as trustees of *Shakespeare's House*, in forming a museum in *Shakespeare's House*, and for such other purposes as the trustees of the will, in their discretion, might think fit, for the purpose of giving effect to his wishes, and it was held that the gift could not be supported either as a charity or as a gift for the benefit of private persons. Even in that case the Lord Justice *Knight Bruce* stated, "that perhaps, if the object of a museum could be dissociated from *Shakespeare's House*, it might be possible to support the gift."

The case of *Carne* v. *Long* (1) was also relied on by the Appellants, but the Lord Chancellor considered the devise in that case as being a devise for a society of individuals at *Penzance*. In the case now before us, both the bequests are bequests to corporations, the objects and purposes of which are the diffusion and improvement of particular branches of knowledge. They subsist for these purposes and no others, therefore for public purposes—therefore, for the advancement of objects of general public utility—therefore for purposes analogous and similar to those mentioned in the statute of *Elizabeth*—therefore for charitable purposes; and this being so, we agree with Vice-Chancellor Sir *John Stuart* that the legacies given to them are charitable legacies, and applicable only to the purposes for which the recipients exist as corporations.

The second appeal is that of the Plaintiffs, and the substantial question which is raised upon this appeal is, in what manner the administration charges, that is, the debts, and funeral and testamentary expenses of the testator, and the costs of the suit, ought to be provided for.

On the part of the Plaintiffs it has not been seriously contended that the proceeds of the sale of the *Madeira* estate can be considered as falling within the words "my pure personal estate," which are found in the will, and it is also admitted that as the *Madeira* estate is only included in the general residuary gift the residuary devisees and legatees can only take it subject to the payment of the legacies.

It was argued on behalf of the charitable legacies, that those legacies are demonstrative legacies, and that they are, therefore,

(1) 2 D. F. & J. 75; 6 Jur. N.S. 639

L. JJ. 1869 BEAUMONT v. OLIVEIRA.

not liable to abate with the other legacies, and that the whole of the administration charges ought to be thrown exclusively upon those portions of the estate which do not consist of pure personalty, and the case of *Robinson* v. *Geldard* was cited as a conclusive authority in support of this proposition. *Robinson* v. *Geldard* was first heard before the Lord Justice *Knight Bruce* when Vice-Chancellor (1), and the Vice-Chancellor said in his judgment, "Had it not been for the recent decisions at the Rolls which have been referred to, I might possibly have thought that consistently with all the modern decisions the debts, and funeral and testamentary expenses, might be borne by the different descriptions of personalty *pro ratâ;* and that then the pure personalty should be applied in the first instance, under the directions of this particular will, in payment of the charity legacies. But I should, by acceding to the argument in favour of the charities, be acting against the opinion which is the foundation of the judgment in *Sturge* v. *Dimsdale*" (2). In deference to those decisions at the Rolls the charitable legacies were ordered to abate, but nevertheless, and in accordance with the opinion expressed by the Vice-Chancellor, the administration charges were ordered to be borne rateably by the pure personal estate and the personal estate savouring of realty. It is true that the petition of appeal (which we have inspected, and which bears the signature of Sir *James Parker* as counsel), did not complain of so much of the order as directed the administration charges to be borne rateably by the two funds, but was confined to that portion of the order which directed that the charitable legacies should abate, and to the consequential directions. Lord *Truro* upon the hearing of this Petition (3) reversed so much of the order of the Vice-Chancellor as directed the charitable legacies to abate; but His Lordship nowhere expresses any dissent from the opinion which had been expressed by the Vice-Chancellor *Knight Bruce*, as to the manner in which the administration charges ought to be borne, and, on the contrary, at the conclusion of the judgment, Lord *Truro* says: "The result therefore is that the Vice-Chancellor's decision, made in deference to the language used by Lord *Langdale*, must be reversed, while at the same time the opinions of both those learned Judges will be affirmed."

(1) 3 De G. & Sm. 499, 500. (2) 6 Beav. 462. (3) 3 Mac. & G. 735, 753.

The opinion of the Vice-Chancellor which is thus affirmed, was that to which we have just alluded, and which was actually carried into execution in the order which was then before the Court in an administration suit. In the same judgment, Lord *Truro* says (1), "These authorities appear to me to shew that the charitable legacies in the present case are demonstrative legacies, or analogous thereto, but whether this is the precise character of these legacies, so that had there been a deficiency of assets they would have been entitled to be paid in full in priority to the other legacies, it is not necessary to decide; all that I need determine in the present case is, whether the legacies to individuals are to be paid partly out of the pure personalty or whether they are to be paid exclusively out of the personalty savouring of realty, which is sufficient for the full payment of those legacies," and he further says (2), "by directing that the charitable legacies shall be paid exclusively out of the pure personalty he [the testator] has plainly shewn his intention that they shall be satisfied out of the pure personalty in preference to the legacies to individuals, whether they are strictly demonstrative legacies or not."

In the case now before us it is clear that the charitable legatees are entitled to be paid out of the pure personalty in priority to the other legatees, and on this point, also, we agree with the learned Vice-Chancellor, but we think that the case of *Robinson* v. *Geldard* (3) cannot be considered as an authority in support of the further contention on the part of the charitable legatees, that the administration charges ought to be thrown exclusively upon the rest of the estate. It is true that this contention is supported by the decision of the present Lord Chancellor, when Vice-Chancellor, in *Tempest* v. *Tempest* (4), but as that decision was overruled by the Lord Chancellor *Cranworth* (5), we are bound to accept the decision of the Court of Appeal as an authority superior to that of the judgment of the Vice-Chancellor which was reversed.

The counsel for the charities treated this decision as resting on a very narrow ground, and in a manner not warranted by the terms of the judgment, when they argued that it depended entirely

(1) 3 Mac. & G. 746.
(2) Ibid. 752.
(3) 3 Mac. & G. 735.
(4) 2 K. & J. 635.
(5) 7 D. M. & G. 470.

L. JJ. 1869 BEAUMONT v. OLIVEIRA.

on the insertion by the testator in that case of the words "in precedence of the other pecuniary legacies." Lord *Cranworth* observed, that in *Robinson* v. *Geldard* (1), Lord *Truro* had said that he must take the direction in the will that the charities were to be paid out of the pure personalty to amount to a declaration of intention that the charitable legacies were to be paid out of the pure personalty in preference to the other legacies, and after commenting on the nature of demonstrative legacies, and saying that he need not puzzle himself with the inquiry whether the legacies were or were not demonstrative legacies, he proceeds to state that the "testatrix has not directed that her debts or funeral or testamentary expenses should be paid out of that part of her personalty which savours of realty, nor has she expressed any intention to release the pure personalty from its legal liability to contribute to the payment of debts which by law are payable rateably out of both classes of personalty." It having thus been held that a direction to pay charitable legacies out of the pure personalty amounts to a declaration of intention that they are to be paid thereout in preference to the other legacies, it would be a strange result of the authorities if the declaration by a testator in express terms of this preferential payment should place the charitable legacies in a worse position than they would have been in, if the testator had left the same intention to be implied from the simple direction to pay out of the pure personalty.

If we consider the case before us independently of the authorities, and as a question of the intention of the testator as expressed in his will, we are led to the same conclusion as that at which Lord *Cranworth* arrived in *Tempest* v. *Tempest* (2). It is clear that the testator had present to his mind the effect of the statute of 9 Geo. 2, c. 36. Mr. *Joshua Williams*, in his book on Personal Property, says (3): "A bequest to a charity ought to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For if this precaution should be neglected, the charitable legacies will fail in the proportion which the personal assets savouring of the realty may bear to those which are purely personal."

We have referred to this passage because in our judgment it defines precisely what was the intention of the testator, and what

(1) 3 Mac. & G. 735. (2) 7 D. M. & G. 470. (3) 5th Ed. p. 321.

was the precaution which he did not neglect. But we cannot find in this will any expression of an intention to relieve the pure personalty from its obligation to contribute rateably with the rest of the estate to the burden of the administration charges, nor to cast that burden exclusively upon the rest of the estate, and we do not feel ourselves at liberty to imply any such intention. We think, therefore, that the order must be varied by directing that the administration charges be paid rateably out of the whole estate, and the charitable legatees will then take what remains of the pure personalty in part payment of their legacies, and they will have a claim upon the rest of the estate for so much of their legacies as shall remain unpaid; but as they are precluded by the statute from taking any part of the personalty savouring of realty, this claim must abate in the proportion which the personalty savouring of realty bears to the proceeds of the *Madeira* estate which are not subject to the provisions of the statute.

We think that the charitable legatees must be allowed their costs of the suit out of the estate, and that the Appellants in the first appeal must bear their own costs of that appeal; but the costs of the Respondents to that appeal, and the costs of all parties of the second appeal, must be paid out of the estate, and the deposits will be returned.

We have prepared minutes in accordance with these views, and they shall be handed to the Registrar.

The following is an abstract of the most important parts of the minutes:—

One order on both Petitions of appeal.

On both Petitions affirm so much of the order appealed from as declares that the five several legacies of £4000 bequeathed to the respective treasurers for the time being of the *Royal Society*, &c., &c., were given for charitable purposes within the intent and meaning of the stat. 9 Geo. 2, c. 36, and as declares that the sum of £806 12*s.* 6*d.* Bank Annuities standing in trust in this cause, being the proceeds of the sale of the property at *Madeira* mentioned in the Chief Clerk's certificate, and £15, being the rent which had been received in respect of the said property since the death of the testator, were not such an interest in land as that a bequest thereof for charitable purposes was within the operation of the said Act. "Vary the rest of the order, and instead thereof declare that the costs and the funeral and testamentary expenses and debts of the testator are payable rateably out of his pure and impure personal estate, and the proceeds and rents of the

L. JJ.
1869
BEAUMONT
v.
OLIVEIRA.

Madeira property; and that, subject thereto, the said five legacies of £4000 each, being charity legacies, are payable out of the testator's pure personal estate in preference to his other legacies, and his other legacies out of his impure personal estate, the charity legacies being by law excluded from participation therein. And declare that the charity and other legacies, so far as they are not paid out of the pure and impure personal estate as aforesaid, ought to participate in the proceeds and rents of the *Madeira* property; but that in such participation the charity legacies, so far as they are unpaid as aforesaid, ought to abate in the proportion which the testator's impure personal estate bears to the proceeds and rents of the *Madeira* estate."

Solicitors: Messrs. *Roy & Cartwright;* Messrs. *Boys & Tweedies;* Messrs. *Few & Co.;* Messrs. *Bailey, Shaw, Smith, & Bailey;* Messrs. *Curtis & Bedford;* Mr. *Cundy.*

L. JJ.
1869
Feb 11.

MILLS *v.* TRUMPER.

11 *Geo.* 2, *c.* 19, *s.* 15—4 & 5 *Will.* 4, *c.* 22—*Apportionment—Tenant pur autre Vie.*

An equitable tenant for life under a settlement of freehold leases for lives, obtained a renewed grant for lives to himself. At his death the property was in the occupation of yearly tenants, under parol demises by him:—

Held (reversing the decision of *Stuart*, V.C.), that the rents were not apportionable either under statute 11 Geo. 2, c. 19, or 4 & 5 Will. 4, c. 22.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* (1).

By indentures of lease and release, dated the 26th and 27th of January, 1811, leaseholds for lives were conveyed to *T. Hughes* and *J. Trumper*, their heirs and assigns, upon trust for *W. W. Trumper* for life, and after his death upon trust for the Defendant *Thomas Trumper*, his heirs and assigns.

On the 11th of May, 1819, all the lives having dropped, *W. W. Trumper*, the equitable tenant for life, obtained a renewed lease of the property for three lives to himself, and subsequently he purchased the reversion in fee, which, on the 21st of January, 1819, was conveyed to a trustee for him.

W. W. Trumper died on the 23rd of December, 1859. At the time of his death the property was occupied by yearly tenants who

(1) Law Rep. 1 Eq. 671.

held under parol demises from him at rents payable half-yearly on the 2nd of February and the 2nd of August. The material question in the cause was, whether his executors were entitled to an apportioned part of the rent. The Vice-Chancellor decided that they were. *Thomas Trumper*, the remainderman, appealed.

Mr. *Joshua Williams*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Kingdon*, for the Appellant, referred to 11 Geo. 2, c. 19, s. 15; 4 & 5 Will. 4, c. 22; *Ex parte Smyth* (1); *In re Markby* (2); *Cattley* v. *Arnold* (3).

[The LORD JUSTICE SELWYN referred to *Brown* v. *Candler* (4)].

Mr. *Willcock*, Q.C. and Mr. *Blakemore*, for the Respondent.

SIR C. J. SELWYN, L.J.:—

As regards apportionment, it is clear that the case does not fall within 4 & 5 Will. 4, c. 22, inasmuch as the demises were not in writing. Is it then within 11 Geo. 2, c. 19, s. 15? I think that it clearly is not within the mischief intended to be remedied by that section, which is stated in the preamble; for the demises were made by a person who had an estate continuing beyond his own life, inasmuch as he held it for several lives which were subsisting at his death. It is equally clear that the case is not within the words of that section, for the demises were not made by a person having only a life estate in the property. But it is said that we must look at the equities, that this is settled property, and that the lessor was beneficially only a tenant for life. But the legal estate ought to have been vested in the trustees, and the tenant for life having, by his own unauthorized act in taking the renewed lease to himself, made himself a *quasi* trustee, cannot be held to be in a better position than if the legal estate had been in the proper trustees and the demise had been made by them, in which case there clearly would have been no apportionment. The case, moreover, is concluded by the authority of *Brown* v. *Candler*, which was not referred to below, and which the able counsel who appeared for the Respondent made no attempt to distinguish from the present case.

(1) 1 Sw. 337.
(2) 4 My. & Cr. 484.
(3) 1 J. & H. 651.
(4) 9 L. J. (Ch.) 212.

L. JJ. 1869 MILLS v. TRUMPER.

SIR G. M. GIFFARD, L.J.:—

If *Brown* v. *Candler* (1) had been called to the attention of the learned Vice-Chancellor he would, no doubt, have followed it. That authority is conclusive. The statute 4 & 5 Will. 4, c. 22, does not apply, as none of the demises were in writing, and the statute 11 Geo. 2, c. 19, does not apply, because they did not determine on the death of the tenant for life.

Solicitors: Mr. *T. Fortune*; Messrs. *Bridges & Co.*

L. JJ. 1869 *Jan.* 29, 30.

In re PERUVIAN RAILWAYS COMPANY.

CRAWLEY'S CASE.

ROBINSON'S CASE.

Acceptance of Shares—Notice of Allotment not sent—Acceptance by executing Transfer—Fully paid-up Shares—Costs of Official Liquidator.

5 Ch 491
10 Eq. 661, 3.
14 Eq 392-5

C. applied, in May, 1865, for shares in company *A.*, at the instigation of *J. P.*, the brother of the managing director of company *B.*, who assured him that he would be indemnified by company *B.* from all liability. *C.* handed the application to *J. P.*, who sent it in and paid the deposit. The shares were allotted to *C.*, and his name was placed on the register, but the notice of allotment was not sent to him but to the office of company *B.* The allotment money, which, with the deposit, amounted to £3 per share, was paid by company *B.* In July, 1866, *C.* executed a blank transfer of the shares which had been allotted to him, at the request of *J. P.*, in order to enable company *B.* to deal with them. In the transfer the shares were described as fully paid up, but in reality no more than the allotment money had been paid. Company *A.* was afterwards wound up:—

Held (affirming the decision of *Malins*, V.C.), that although *C.* might have repudiated the shares in July, 1866, on the ground of his having received no notice of the allotment, yet by executing the transfer he had accepted the shares, and he was placed on the list of contributories for the number of shares allotted to him, with £3 only paid up.

R. applied for shares in company *A.* at the instigation of the managing director of company *B.*, who gave him a letter on behalf of company *B.*, indemnifying him against all responsibility. *R.* sent in the application himself from his own address, and paid the deposit by a cheque on his own banker, although the money was supplied by company *B.* The shares were allotted to *R.*, and his name was placed on the register; no notice of allotment was sent to him, but the notice was sent to the office of the company *B.* Company *A.* was afterwards wound up:—

(1) 9 L. J. (Ch.) 212.

L. JJ.
1869
CRAWLEY'S CASE.
ROBINSON'S CASE.

Held (reversing the decision of *Malins*, V.C.), that there was no contract to take the shares, and *R.'s* name was removed from the list of contributories.

Where, on an appeal, the official liquidator supports unsuccessfully the decision of the Court below, his costs of the appeal will be allowed out of the estate—where he appeals and is unsuccessful it will be left to the Court below to determine whether they shall come out of the estate.

TWO appeals were brought in this matter from orders of Vice-Chancellor *Malins* made in the winding up of the *Peruvian Railways Company, Limited.* The company was incorporated under the *Companies Act*, 1862, in the month of May, 1865, with a nominal capital of £3,340,000 in shares of £25 each.

On the 8th of May, 1865, an agreement was made between the *Railway Company* and the *International Contract Company*, by which it was agreed that the *Railway Company* should purchase two concessions for the construction of railways in *Peru*, of which the *Contract Company* was possessed, for the price of £3,340,000; the *Contract Company* agreeing to subscribe for and take the whole of the share capital and funds of the *Railway Company*, and to construct the railways. In pursuance of this agreement the secretary of the *Railway Company* was empowered to issue shares to the *Contract Company* or their nominees as they were applied for; and an arrangement was made under which cheques were drawn by the *Contract Company* for the full amount due on the shares, and these cheques were immediately handed back to the *Contract Company* as security for the money due to them from the *Railway Company*.

The *Contract Company* applied for 15,000 shares in their own name and 84,950 in the names of nominees.

The *Railway Company* was ordered to be wound up in 1867, the *Contract Company* having been wound up in the previous year.

Mr. *G. N. Crawley* and Mr. *J. Robinson* applied for shares as nominees of the *Contract Company*, and were placed on the list of contributories. Their cases differing in some important particulars were argued separately.

CRAWLEY'S CASE.

IN May, 1865, *Crawley* was applied to by Mr. *John Pickering*, the brother of Mr. *Edward Pickering*, the managing director of

L. JJ. 1869 CRAWLEY'S CASE.

the *Contract Company*, to take shares as the nominee of the company. Mr. *J. Pickering* assured him that he would merely be a trustee for the company and would be indemnified by them from all liability. *Crawley* accordingly, on the 29th of May, filled up an application for 400 shares, and handed the application to Mr. *J. Pickering* who sent it in to the company, and paid the deposit to the bankers. In answer to this application 300 shares were allotted to *Crawley*.

On the 15th of July, 1865, the secretary of the *Railway Company* filled up notices of allotment for the shares which had been applied for, but the notices of those applicants who were considered to be nominees of the *Contract Company* were not sent to them, but were separated from the others and handed to Mr. *Ernst Kozhevar*—Mr. *Edward Pickering's* private secretary—who took them to the *Contract Company's* office. *Crawley's* shares were among those thus taken to the *Contract Company's* office. No notice of the allotment was ever communicated to him, and the rest of the allotment money amounting, with the deposit, to £3 per share was paid by the *Contract Company*. In the month of July, 1866, Mr. *J. Pickering* brought to *Crawley* a blank transfer of the shares which had been allotted to him, marked from 5691 to 5990, and which were described in the transfer, and entered in the *Contract Company's* books, as having been fully paid up, though no payment except the £900 had been made. *J. Pickering* asked *Crawley* to execute the transfer in order that the *Contract Company* might deal with the shares. *Crawley* accordingly executed the transfer of the 300 shares in blank, and delivered it to *John Pickering*. *Crawley* filed two affidavits, in the second of which he stated that *J. Pickering* told him that the shares had been fully paid up, and that it was in the belief that the shares which might have been allotted to him as the nominee of the *Contract Company*, and which were included in the transfer, were fully paid-up shares, that he executed the blank transfer, and unless he had understood that they were fully paid-up he would not have executed it.

Under these circumstances the Vice-Chancellor held that he ought to be placed on the list of contributories for 300 shares, on which £3 per share only had been paid.

Crawley appealed from this decision.

Mr. *Cole*, Q.C., and Mr. *Hanson*, for the Appellant:—

The allotment was never communicated to *Crawley*, but only to the agent of the *Contract Company*, who was not the agent of *Crawley*. The circumstances are not materially different from those in *Wallis's Case* (1), where the Court of Appeal held that

(1) 1868. July 16. L.JJ.

PERUVIAN RAILWAYS COMPANY.

WALLIS'S CASE.

IN this case *H. E. Wallis* applied for 200 shares at the instigation of Mr. *J. Pickering*, the brother of Mr. *E. Pickering*, the managing director of the *Contract Company*. The deposit was paid by Mr. *J. Pickering*.

The *Railway Company* allotted 60 shares to *Wallis*, but no notice was sent to him or to Mr. *J. Pickering*. The notice was, however, sent through Mr. *E. Pickering's* private secretary to the office of the *Contract Company*, among the notices of the nominees of *Contract Company*.

The Vice-Chancellor (Sir *R. Malins*) was of opinion that Mr. *E. Pickering* was the agent of *Wallis* to accept the shares allotted to him, and that his name was rightly placed on the list of contributories.

From this decision *Wallis* appealed.

Mr. *Cole*, Q.C., and Mr. *Ince*, for *Wallis*.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the official liquidator.

SIR W. PAGE WOOD, L.J., said that the decision of the Vice-Chancellor seemed to have been founded upon a misapprehension arising from the names of the two Messrs. *Pickering*. With *Edward Pickering*, *Wallis* had nothing to do; but *John Pickering* was the agent of *Wallis* to a certain extent. The Vice-Chancellor seemed to have thought that *Edward Pickering* was the agent of *Wallis*, not only to make the application, but to receive the allotment. But that was erroneous. *John Pickering*, who was the real agent, never received the allotment, and *Edward Pickering* was not his agent at all.

It was certain that the company never did transmit, either to *John Pickering* or to *Wallis*, any notice of the allotment. In truth, the notice of allotment was sent to somebody else, with an intention the very reverse of its being communicated to *Wallis*, and with the intention that he should not have the shares. He was supposed to be one of the nominees of the *Contract Company*, and as to all such shares, they did not intend to send them out, except in cases where they could get a transfer.

It was true that if notice *aliunde* could be brought home to him that would be sufficient to fix him on the list. But upon that point there was no evidence, except that some communication took place between Mr. *John Pickering* and *Wallis*, the particulars of which were not clear. On the whole, he was of opinion that there was no allotment to *Wallis*.

SIR C. J. SELWYN, L.J., said, that in the present case the evidence was imperfect and unsatisfactory; but so far from leading to the conclusion that an unconditional allotment was communicated to *Wallis*, or to any authorized agent for him, it rather led to the conclusion that, although certain letters of allotment were written, they were so dealt with as to lead to an entirely op-

L. JJ. 1869 CRAWLEY'S CASE.

Wallis was not a contributory. The only difference is, that *Crawley* executed a blank transfer in July, 1866, fourteen months after the application for the shares. At that time he was not in any way bound to take the shares; he had every reason to believe that his application had been refused, and the company could not have obliged him to take them after so long a delay. The shares which were included in the transfer were not what he had applied for; they were fully paid-up shares, and he executed the transfer on the understanding that they were such, and for that reason he did not consider it necessary to apply to have his name struck off the register. If he is put upon the list now it can only be for fully paid-up shares: *Baron de Beville's Case* (1).

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the official liquidator, were not called on.

SIR C. J. SELWYN, L.J.:—

The first case we have to dispose of is that of Mr. *Crawley*, who has been put on the list by the Vice-Chancellor as a contributory for 300 shares, and the Vice-Chancellor has decided that, although in the books they appear as shares upon which the whole sum of £25 has been paid up, they are to stand as shares upon which only £3 has been paid.

Mr. *Crawley's* contention is, first, that he ought not to be put on the list at all, and if at all only in respect of shares on which the whole sum has been paid. It is material to observe the distinction in the outset which exists between what are commonly called paid-up shares and shares upon which the whole amount has been paid by instalments, because the expressions "fully paid-up shares" and "the issuing of fully paid-up shares," generally apply to cases where, by reason of some concession having been

---

posite result to that which would have happened if there had been an unconditional allotment. For the effect of what took place was, that the shares could not have been dealt with by the nominees of the *Contract Company*. *Wallis* intended to have the shares, if they were allotted to him, and signed an application in the usual form. There was no evidence that that offer was accepted. His name must, therefore, be removed from the list of contributories.

(1) Law Rep. 7 Eq. 11.

given, or some preliminary expenses having been incurred, it is a part of the contract, upon the original constitution of the company, that certain persons, without any payment at all, shall be entitled to fully paid-up shares. This transaction is not one of that kind at all. It does not appear there was any such contract for any fully paid-up shares; and in the case of Mr. *Crawley* he has very fairly and properly made the same admissions as were made in *Wallis's Case*, and one of those admissions is, that, by his authority, his agent made an application, signed by him, for those 300 shares, and that his agent paid the sum of £300 as part of the money which became payable in respect of those shares. He must be taken, therefore, to have known that £1 on each of those shares was a sum of money paid by his agent on his account, and that something had been paid in respect of those shares, and that therefore it never could be said of those shares that they were, in the first of the two senses to which I have alluded, fully paid-up shares; but if the whole sum which became payable had been paid it could only be by means of the subsequent payment of the remaining £24.

Under those circumstances, Mr. *Crawley* having signed the letter of application, it is admitted that no communication was made to him for the period of fourteen months, and it is consequently said that he was in a position to withdraw his application, or to have said that more than a reasonable time had elapsed since the application was made without its being accepted, and the application therefore was no longer in force. Assuming, for the sake of argument, that Mr. *Crawley* was in that position, what is the account which he gives of the transaction in July, 1866? [His Lordship then referred to the first affidavit filed by *Crawley*, and continued:—] Assuming for a moment that Mr. *Crawley* might at that time have treated the application as at an end, and have refused to have anything more to do with the affairs of the company, he does not so deal with the matter. The company, on the other hand, having received his money and having entered his name on the books, it was competent for him to have closed the transaction by saying, "I accept the shares, and I ratify that which was done by my agent." Must he not, therefore, be taken to have done this? He is requested to execute a transfer of the shares.

L. JJ. 1869 CRAWLEY'S CASE.

Before he could transfer the shares he must have known that the shares were in his name. Lord Justice *Rolt* said in *Levita's Case* (1), that where a man knew he could not act as director unless shares had been transferred to him, and made an application for the shares, and then afterwards attended the board of directors and acted as a director, that was a strong circumstance to shew that he knew the shares were allotted to him. The present case is, in my judgment, still stronger, because Mr. *Crawley* executes a transfer of particular shares numbered from 5691 to 5990, which would be a mere nullity unless he had those shares. He does not say that it was an entirely new, separate, and independent transaction; and therefore, although he might at that time have been at liberty to repudiate the original transaction, he adopts and sanctions it by an act which would have been without any meaning unless he had been at that time the holder of those shares. I think that after that act he cannot be heard to say that he did not know of the allotment, or that it had not been communicated to him, or that he any longer insisted on such right as he might have had at that time, to say that too great a length of time had elapsed in order to make it possible for the company to enforce the contract against him in respect of his application.

Then Mr. *Crawley* has made a subsequent affidavit, and I cannot help looking with some degree of suspicion upon an affidavit made when the case is in Court, and after the person making the affidavit in his own interest has been advised exactly as to the difficulty of his own case; but even in that second affidavit he does not carry the case any further. [His Lordship read the affidavit, and continued:—] It appears to me that his own corrected statement itself clearly admits that the shares in respect of which he was then about to execute the transfer were the shares which had been allotted to him on the footing of his original application. He knows that the shares are standing in his name in the books of the company, and he accepts them and executes a blank transfer, which he puts into the hands of the *Contract Company*, the effect of which is that until the transfer is filled up he remains legally a shareholder in the company in respect of the shares. So the matter remains till the winding-

(1) Law Rep. 3 Ch. 36.

up. Under these circumstances he cannot, I think, be heard to say he was not in the position in which he had placed himself by his own act.

There then remains the only other question, as to whether he ought to be treated as the holder of fully paid-up shares. The observations I made at the commencement of my judgment dispose, I think, of that; because they were not fully paid-up shares at all. He thought fit to trust to the assertions made to him by Mr. *J. Pickering*, who professed to act on behalf of the *Contract Company*, that all the money payable on the shares had been paid up; and accordingly in the books of the company the shares are not entered as if issued originally as fully paid-up shares, but they are entered as having been paid for by two different instalments. That is the entry in the book, and that is the representation which *Crawley* says was made to him by Mr. *J. Pickering*. He thought fit to trust to that representation; that representation turns out to be unfounded, for no payment, except the allotment money, has ever been made in respect of those shares.

I think, therefore, that the order of the Vice-Chancellor is correct in fixing *Crawley* on the list of contributories in respect of these shares, as shares not fully paid up. The appeal motion must therefore be refused with costs.

SIR G. M. GIFFARD, L.J.:—

I quite agree with the conclusion at which the Vice-Chancellor has arrived. I have no hesitation in saying that, upon the evidence of *Crawley's* own affidavits, I am satisfied that he put himself not into the hands of *John Pickering*, but into the hands of *Edward Pickering*, that is, into the hands of the *Contract Company*: for his account of the transaction is wholly different from the account of the transaction in *Wallis's Case*, and is also quite different from the account we have presently to deal with in *Robinson's Case*. His account is that *John Pickering* came to him on behalf of the *Contract Company* and on behalf of *Edward Pickering*, and it was on their behalf that he was asked to sign an application for shares. *Edward Pickering* and the *Contract Company* were to make every payment in respect of those shares. It remains in that state, as far as he is concerned, without any further inquiry, until

L. JJ. 1869 CRAWLEY'S CASE.

a blank transfer is brought to him: the real effect of the communication is this: "We agreed with you to pay everything that would have to be paid in respect of those shares, and we now tell you that you are a shareholder, and we ask you to execute this transfer as such, and we tell you at the same time we have fully indemnified you." Unquestionably they have not fully indemnified him in respect of those shares. Whether he could have repudiated them at that time it is unnecessary for me to say, but unfortunately, without further inquiry, he executed the transfer, and he could only do that upon the footing of being a shareholder; the company was not wound up for many months after. I say, therefore, that to my mind it is a perfectly clear case, and this gentleman must be on the list as having been a shareholder. Whatever representations were made to him by the *Contract Company*, as between them and the *Railway Company*, and the other shareholders in the *Railway Company*, he could not say that by executing the transfer he had not acknowledged that he was a shareholder. The appeal must therefore be dismissed with costs.

ROBINSON'S CASE.

MR. *J. ROBINSON*, and his partner Mr. *Carter*, were applied to by Mr. *Edward Pickering* to take shares in the *Railway Company*, as nominees of the *Contract Company*, which they agreed to do on being indemnified by the *Contract Company*. Accordingly, on the 15th of June, 1865, each of them signed the usual form of application for 1000 shares, in his own name, and from his own address, and paid a deposit of £1 per share by a cheque on their own bankers, the money having been furnished by Mr. *E. Pickering*, who, at the same time, gave them a letter in the following terms:—"Gentlemen,—The 2000 shares which have been applied for by you this day in the *Peruvian Railways Company, Limited*, are on our account, and we agree to accept the transfer of them at any time you may require, and we shall hold you free from all loss upon such shares." The applications were taken to the bankers by one of *Robinson's* clerks. *Carter* was a director in the *Railway Company*, and his liability was not now in dispute.

In answer to *Robinson's* application, 800 shares were allotted to him. The notice of allotment was never sent to him, but was included among the notices to the nominees of the *Contract Company*, which were taken by Mr. *Kozhevar* to the office of that company. The remainder of the allotment money, namely, £2 per share, was paid by the *Contract Company*. *Robinson* had no notice of the allotment till he heard that his name was on the list of contributories. The Vice-Chancellor, however, held that *Robinson* being a nominee of the *Contract Company*, his name ought to be on the list of contributories in respect of 800 shares, of which £3 only was paid up. *Robinson* appealed from the decision.

Robinson was also the holder of eighty-four other shares which had been transferred to him in January, 1866, but his liability on these shares was admitted.

Mr. *Kay*, Q.C., and Mr. *Ince*, for the Appellant:—

The circumstances of this case are almost identical with those in *Wallis's Case*. Mr. *E. Pickering* was *Robinson's* agent to apply for the shares, but he was not his agent to receive the notice of allotment, which was sent to the *Contract Company*.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

The distinction between this case and *Wallis's Case* is this:—*Wallis* was not fixed as the nominee of the company. He authorized Mr. *J. Pickering* to apply for the shares for him; but in this case *Robinson* expressly applied for the shares as the nominee of the *Contract Company*, through Mr. *E. Pickering*, their managing director. That gentleman was, therefore, his agent, to accept the shares as well as to apply for them.

SIR C. J. SELWYN, L.J.:—

The notice of motion in this case relates to 884 shares, but the case is abandoned so far as relates to eighty-four shares, in respect of which it is admitted that the order of the Vice-Chancellor is correct. In respect of the other 800 shares, a question of some importance has been raised, and I should be extremely unwilling to say anything which could be supposed to relax the authority of those cases in which it has been held that where a person takes upon

L. JJ. 1869 ROBINSON'S CASE.

himself the liability of a shareholder, he cannot escape from that liability by shewing that he is a trustee for another person. It is equally clear, whether in the case of a trustee or any other person, that there must be that which the law requires in order to constitute a contract, and one of the things now determined to be essential to the constitution of a contract is that the letter of application should be followed by an allotment and communication of that allotment. The form of the communication is not material, but it has been decided in cases of which *Gunn's Case* (1) may be taken as an example, that unless there is a communication of the allotment to the person who has made the application for the shares there is no concluded contract, and he does not become a shareholder. That rule applies to a person in the position of a trustee as much as to anybody else. But, of course, in considering the question whether the allotment has been communicated to him or to an authorized agent of his, the circumstance of his being a trustee might be a very important circumstance in enabling the Court to judge whether he had or had not given authority to any other person to act for him, and also to receive notice of the allotment in his place. The question which, in truth, we have to try is, whether *Robinson* did authorize the *International Contract Company*, or any other person, to act for him, or in his place, with respect to receiving notice of the allotment. The argument has been carried to this height, and must necessarily have been carried to this height —that he gave to them such an authority that they might have acted on his behalf and in his name without any communication whatever with him for a great number of years, and until the whole £25 per share had been called up, although during all that time he should have been perfectly ignorant that he was a shareholder at all, or that any contract had been entered into.

Now, we have to look at the facts of the case to see whether there is any evidence of such an authority. We come first to the letter of application, which contains no reference to the *International Contract Company*, and no reference to any other person, as having any interest in the shares which were so applied for. It is made in *Robinson's* own name, and (what I think is very material) the address given, which I consider must have been given

(1) Law Rep. 3 Ch. 40.

for the purpose of indicating the place to which the answer to that letter was to be sent, was *Robinson's* own address. It is admitted that he was, in fact, one of the nominees of the *International Contract Company*, and that the money which was paid was not his own money, but was, in fact, the money of the *International Contract Company*. If he had given to the *International Contract Company* this unlimited authority, one would have expected to find that the letter would have contained some reference to them, either by inserting their address, or by saying, as in *Levita's Case* (1), that it was made on behalf and in the interest of another person. There is nothing of that kind in this letter. And so also with respect to the payment. If there had been this unlimited agency in the company to act for *Robinson*, one would have supposed they would have paid the money directly, instead of going through the mere form of paying the money into his bankers, and then his drawing it out again by his own cheque and paying it to the company. But that was what took place. So far from there being any idea of *Robinson* constituting the *International Contract Company* his agents, the parties studiously acted apart, and took all these precautions in order to arrive at exactly the opposite result, namely, that *Robinson* was to do everything either by himself or by his partner, and the letter of application was taken to the bank by one of *Robinson's* clerks.

We come then to the letter upon which great reliance has been placed, the letter of indemnity which was given at the time:—[His Lordship read the letter.] I think that the terms of that letter are exactly in accordance with all the preceding transactions, and with the letter of application, because it is quite clear that the matter was not to be left in the state in which it then was without any further communication between the parties, and that the *Contract Company* were not to be at liberty to go on for any length of time dealing with the shares as they might think fit without any reference whatever to *Robinson*. On the contrary, the shares were, in the first place, to be allotted to *Robinson*, and then the company undertook to accept the transfer at any time he might require—that, of course, might have been the very next day after the shares had been allotted to him—and that necessarily im-

(1) Law Rep. 3 Ch. 36.

L. JJ. 1869 ROBINSON'S CASE.

plies that the intention of the parties was, that not only was there to be a communication to him, but that there was to be a communication of such a nature as would have enabled him at any time to insist upon the performance of the contract contained in this letter, and to require them to accept the transfer.

I think, therefore, that the whole of the circumstances of this case entirely negative the notion of Mr. *Robinson* having given to the *Contract Company* any such unlimited authority as that which has been contended for. He is, therefore, remitted to his original right, which every applicant for shares possesses, whether he be a trustee or not, of having a communication made to him, or to some agent authorized by him.

Being of that opinion, the case is brought clearly within the authority of *Wallis's Case*, and I speak of it as being an authority because it was decided by the present Lord Chancellor. I am of opinion, therefore, that in this case the application must succeed, and that the order of the Vice-Chancellor must be varied by limiting *Robinson's* liability in respect of shares to the eighty-four shares upon which it has been admitted that he is a shareholder, and that the list must be corrected by leaving him a contributory in respect of eighty-four shares only, instead of 884.

SIR G. M. GIFFARD, L.J. :—

The question for solution in this case I believe to be this, namely, as between *Robinson* and the *Railway Company*, was the *International Contract Company* authorized to communicate with him, or to receive communication from the *Railway Company*, so as to bind *Robinson?* To that question, I answer that I do not think the *International Contract Company*, either by itself or its agents, was authorized to communicate on *Robinson's* behalf with the *Railway Company* so as to bind *Robinson*. If we look at the nature of the transaction, it is the very reverse of the case which we have just disposed of, because it originated in this way: A person goes to this gentleman, and desires him to take shares, no doubt as a trustee for the *International Contract Company*, and the course that is taken is, that there is given to him a private letter of indemnity, and then he writes his own letter of application, he sends his address in the letter of applica-

tion, he takes cheques for the money from the *International Contract Company*, those cheques are paid by *Robinson* into his own bankers, and then he draws cheques of his own and sends them by one of his own servants to the *Railway Company*. It is clear, I think, from this that the person who was to communicate with the *Railway Company* was *Robinson* himself, and not the *International Contract Company*. As between *Robinson* and the *Railway Company* the *International Contract Company* never intervened in the slightest degree, nor can we infer from that transaction that it was intended they should intervene. Nothing in the shape of authority for receiving communication was given by the letter, nor could any person so communicating and so dealing with the *Railway Company* come to any other conclusion than that, as between him and the *Railway Company*, he was the person, and the only person to be looked to. To that I add that it was undoubtedly of importance that those names which were on the shareholders' list should go forth to the world as really and truly being shareholders. I believe that was the object and purport of that transaction, and I am quite satisfied that in no sense were the *International Contract Company* the agents of *Robinson* for any purpose or in any way. That being so, I agree in affirming the order so far as regards the eighty-four shares, and varying it as regards the 800.

SIR C. J. SELWYN, L.J. :—

With respect of the costs of appeals in winding-up cases, we wish it to be understood that, as a general rule, where the official liquidator supports the order of the Court below, and is unsuccessful, he will be allowed to have his costs of the appeal out of the estate ; where he appeals, and is unsuccessful, and is ordered to pay costs, this Court leaves it to the Judge of the Court below to determine any question which may arise between the official liquidator and those whom he represents with respect to such costs.

Solicitors for the *Peruvian Railway Company*: Messrs. *Freshfields.*

Solicitors for *Crawley*: Messrs. *Randall & Angier.*

Solicitors for *Robinson*: Messrs. *Ashurst, Morris, & Co.*

L. JJ.
1869
Jan. 22, 23.

LOCKETT *v.* LOCKETT.

Pleading—Answer—Exceptions—Partnership Accounts—Amount received.

A Defendant who, by answer, denies the Plaintiff's right to an account, but makes admissions sufficient for the purposes of the suit up to decree, cannot be required to give, by answer, further accounts.

A bill was filed by one partner to set aside an agreement under which the partnership had been dissolved, and alleged that the other partner had represented a certain debt to be bad which was not so. The interrogatories asked the Defendant to set forth what sums he had received in respect of this debt, and also to set out the partnership accounts. The Defendant, by his answer as to the debt, set forth the particulars as to a patent assigned to him by the debtors, and proceedings connected therewith, and said that he had received on account of his interest in the patent more than the amount of the debt; and by his answer as to the accounts the Defendant said that they were very extensive, that the Plaintiff had always access to the books, and that the Defendant had no means of giving the information sought except by referring to the books, and could only give the particulars required by employing an accountant, and submitted that he ought not to be obliged to set forth the accounts:—

Held (affirming the decision of *Malins*, V.C.), that the answer was sufficient. *White* v. *Barker* (1) followed.

THE Plaintiff and Defendant in this case had been partners, and dissolved partnership in 1861, when the Plaintiff received £10,000 and retired, leaving the Defendant in possession of the partnership property subject to the liabilities, under a written agreement to that effect. The Plaintiff, in 1867, filed this bill, stating that the Defendant had misrepresented the real state and value of the assets and liabilities, which could only have been discovered by a careful investigation; in particular, in respect of a sum of £32,000 due from Messrs. *Swayne & Bovill*, which the Defendant was said to have stated to be of no value, whereas it was a good debt, and had been recovered by the Defendant; the bill also alleged that this debt ought to have been excepted from the accounts; and the bill prayed that the agreement of dissolution might be set aside and the accounts taken from 1861; or, if the agreement was not set aside, that the Defendant might be ordered to pay to the

(1) 5 De G. & Sm. 746; 17 Jur. 174.

Plaintiff one-half of what he had received on account of *Swayne & Bovill's* debt.

The Plaintiff filed interrogatories, the 29th and 39th being as follows:—

29. "Has not the Defendant, in fact, received, and whether or not in respect of the said debt, sums amounting to the sum of £20,000, or some other or what sum? Is he not about to receive, and will he not shortly receive, other and what large, or some and what, sums or sum, either directly or indirectly, on account of the said debt; and whether or not to an extent exceeding altogether the sum of £100,000, or some other and what sum? Is it not the fact that the Defendant has already received, or is likely to receive, other and what, or some and what, sums and sum of money from the said Messrs. *Swayne & Bovill*, or the said *G. H. Bovill*, and whether or not on account of the said debt? Let the Defendant set forth a full, true, and particular account of the particulars of all sums agreed to be paid to the Defendant, or which are expected by the Defendant to be paid, or which will be paid to him in respect of the said debt of the said Messrs. *Swayne & Bovill*."

39. "Let the Defendant set forth a full, true, and particular account, and all particulars, of all the debts and liabilities of the said partnership at the date of the said agreement of the 2nd day of November, 1861, and a like account and particulars of all the property, assets, debts, credits, and effects of the partnership, and the value thereof respectively, and of each particular item thereof."

The answer with respect to the debts contained a long account of the Defendant's dealings with Messrs. *Swayne & Bovill*, and of the assignment to him of certain patents of *Bovill's* for inventions, and of extensions of those patents obtained by him, and of much litigation at his expense connected with those patents, and in answer to the 29th interrogatory, submitted that the Plaintiff had no right to an account of the moneys received on account of these patents, but said: "I admit that I have received or am entitled to receive, and shall ultimately receive, in respect of my interest in the said invention during the original and extended terms, taken together, sums exceeding in the whole the amount of the debt as aforesaid owing at the date of the dissolution of partnership in

L. JJ. 1869 LOCKETT v. LOCKETT.

1861 from the said Messrs. *Swayne & Bovill* to the partnership formerly subsisting between the Plaintiff and me."

As to the accounts, the answer stated that the books of the partnership had for some years been kept by the Plaintiff and afterwards by a clerk, and the Plaintiff had always had access to the books, and could now have access to them: that in pursuance of an order obtained in this suit some of the books had been deposited in Court, and that others were in constant use, but might always be seen by the Plaintiff; that the accounts extended over very many years and were of great length; that the Defendant had set forth answers to all such of the inquiries as could be answered without setting forth at great length and with unnecessary prolixity accounts of transactions of great magnitude; and the answer contained the following statement: "And I further say that, save by the examination and inspection of the said books, I have no means whatsoever of obtaining or giving any further or other knowledge or information than such as is contained in this my answer with respect to any of the particulars inquired after in any of the interrogatories or parts of interrogatories referred to in this paragraph. And I further say, that I am upwards of sixty-eight years of age, and am not a professional accountant, and that I believe it would require long and continuous labour of a professional accountant, and considerable expenditure of time and money, to ascertain from the said books such of the various particulars inquired after in the interrogatories and parts of interrogatories referred to in this paragraph of my answer, as can be ascertained therefrom, and are not in this my answer set forth; and I further say that the agreement for the dissolution, dated the 2nd day of November, 1861, referred to in the Plaintiff's bill, was entered into for the express purpose, among others, of avoiding and rendering unnecessary the taking of the accounts of the said late partnership, and I humbly submit and insist that it would be oppressive and unreasonable, and could lead to no satisfactory or useful result, to require me to go through the said books myself; and that it would lead to great and useless expense if I were to employ an accountant so to do, inasmuch as I could only state the results which the accountant had arrived at; the accuracy of which results I should not be able to test. And I also humbly submit,

that I ought not to be required to answer further any of the interrogatories, or parts of interrogatories, referred to in this paragraph of my answer."

The Plaintiff excepted to the answer as to the 29th and 39th interrogatories, and the Vice-Chancellor *Malins* overruled the exceptions.

The Plaintiff appealed.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, in support of the exceptions:—

The Defendant has not answered our interrogatories at all. We say that he represented this debt to us as bad, and we have a right to know what he has received in respect of it. If we succeed in this suit, we shall have a right at once to half this money, and we are therefore entitled to know what it is.

Sir *Roundell Palmer*, Q.C., Mr. *Little*, Q.C., and Mr. *North*, for the Defendant.

Mr. *Glasse*, in reply.

[*White* v. *Barker* (1); *Kay* v. *Hargreaves* (2); *Adams* v. *Fisher* (3); *De La Rue* v. *Dickinson* (4); *Mansell* v. *Feeney* (5); *Swabey* v. *Sutton* (6); *Lett* v. *Parry* (7); *Drake* v. *Symes* (8); *Telford* v. *Ruskin* (9), were referred to.]

Jan. 23. SIR C. J. SELWYN, L.J.:—

As to the interrogatory respecting the debt from Messrs. *Swayne & Bovill*, the answer given by the Defendant is in substance this: "I have not actually received that debt, but I have entered into certain transactions with the debtors, the particulars of which I relate, by virtue of which I have received large sums of money, which, though not in my view received at all in respect of that debt, exceed the debt due from them." Now, according to the

(1) 5 De G. & Sm. 746; 17 Jur. 174.
(2) 14 L. T. (N.S.) 281.
(3) 3 My. & Cr. 526.
(4) 3 K. & J. 388.
(5) 2 J. & H. 313.
(6) 1 H. & M. 514.
(7) Ibid. 517.
(8) Joh. 647.
(9) 1 Dr. & Sm. 148.

6 Jur. N.S. 318

L. JJ. 1869 LOCKETT v. LOCKETT.

principles laid down by the Lords Justices in *Clegg* v. *Edmondson* (1), though not in a formal judgment, and followed by the present Lord Chancellor when Vice-Chancellor, where, with respect to any particular account, the Plaintiff's right to the account is denied, but the Defendant gives such an admission as is sufficient for all the objects of the suit up to and including the decree, the Defendant need not give any further details respecting the account. Now in this case the object of the Plaintiff was to shew that by means of misrepresentation and concealment he was induced to enter into an agreement; that one thing concealed was the value of the debts, and that this particular debt was represented to be of little value, whereas it turned out to be of large value. Therefore an admission that the sums received, if they are to be taken as paid in respect of that debt, amount to more than the debt, is an admission that the debt was good, and consequently that admission is sufficient for the purposes of the decree. If, therefore, the matter rested there, the answer would be clearly sufficient. But it was argued further for the Plaintiff, and authorities were cited in support of the proposition, that in this case he had a further right, and that though he might have obtained on the answer sufficient admissions for a decree, he had a right to have such an answer as would save him from the expense of taking an account under the decree. But even if he should obtain relief on the alternative prayer, which is very doubtful, no such final decree could be made at the hearing; for in any case, and if the Defendant is treated as a trustee, he would have the rights of a trustee. And if, as he says, he recovered this money by a great expenditure in obtaining an extension of the patent, and defending the patent, this must be allowed to him on taking the accounts. Therefore, both technically and substantially, the answer is sufficient, and the first exception must be overruled, with costs.

As to the second exception, what was sought is not, as has been argued, a summary, or balance sheet, or a statement of the final account. If there were any attempt by the Defendant to evade answering such a simple matter it would have been different; but no such simple question has been asked, or, at all events, if asked, it is not included in the exception. The Defendant

(1) 3 Jur. (N.S.) 299.

was asked to set forth full, true, and particular accounts of a very extensive business, and in such a case the principle upon which the Court has always acted is to consider the circumstances of the case, and see what useful object could be served by compelling such an account; and the more strict the Court is in compelling a full answer, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner. Lord *Redesdale* (1) says, that "In the case of an account required wholly independent of the title the Court has declined laying down any general rule, deciding ordinarily upon the circumstances of the particular case. Thus, to a bill stating a partnership, and seeking an account of the transactions of the alleged partnership, the Defendant, by his answer, denied the partnership, and declined setting forth the account required, insisting that the Plaintiff was only his servant; and the Court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account. And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the Court has sometimes limited the power of excepting, so as to protect the Defendant from setting forth accounts not material to the Plaintiff's title where that title has been very doubtful." The Vice-Chancellor Sir *J. Parker*, than whom few, if any, higher authorities could be cited with respect to any matter relating to equity pleading, expressed himself to a similar effect in his judgment in *White* v. *Barker* (2). It has been attempted to distinguish that case from the present by saying that in the present case the accounts sought for are material for the purpose of establishing the case of misrepresentation alleged by the bill, and consequently that they are the foundation of the title to relief of the Plaintiff. But on reference to *White* v. *Barker* it will be found that there the Plaintiff sought a declaration that a particular business was the same business which had been carried on by the intestate during his life, and ought to be considered as having been carried on by the Defendants for the benefit of the estate, and the Plaintiff asked for the consequential account. It is obvious, therefore, that the accounts there sought were very material for the purpose of

(1) Page 371, 5th Ed. (2) 5 De G. & Sm. 746; 17 Jur. 174.

L. JJ. 1869 LOCKETT v. LOCKETT.

shewing the circumstances under which the business was carried on, and for the purpose of proving the identity of the business, upon which the title of the Plaintiff in that case to the declaration sought by the bill was dependent. That case is therefore an authority in point upon the present case; and if the rule is taken to be as expressed by Lord *Redesdale*, that in these cases of laborious accounts the Court must look at the particular circumstances of each case, or, as expressed by Sir *James Parker*, that we must inquire what object would be gained by compelling the Defendant to do that which he is required at great expense and trouble to do, and if we then look at the circumstances of the present case, we find the circumstances stronger in favour of the Defendant than those which existed in *White* v. *Barker* (1). The Plaintiff says in his bill, that nothing but a careful investigation of the books and accounts by a professed accountant would have enabled the Plaintiff to discover how the affairs of the partnership itself stood. If we look at the object to be gained by the Plaintiff, one can understand that if he had asked any precise and particular questions, as mentioned before, he might, and probably would, have obtained something which was material for the purpose of the suit up to and including the decree; but he has either not thought fit to ask any such question, or if he has asked it, he has admitted that he has obtained a sufficient answer. No useful object could be attained by the Plaintiff by obtaining a precise answer to this very particular and minute interrogatory, which requires the Defendant to set forth the particulars of all the debts and liabilities of the partnership, and an account of all the property, assets, debts credits, and effects of the partnership, and the value thereof respectively, and of each particular item thereof. That would, in truth, be nothing more than setting out a long account copied from these books, of which the Defendant, in fact, knew no more than the Plaintiff—from books to which the Plaintiff himself had access up to the very day of the date of the dissolution of the partnership, and which for a period some years prior to the dissolution of the partnership had been kept by the Plaintiff himself. No useful object would be answered by a mere setting out the account from those books, and every object would be answered by an inspection

(1) 5 De G. & Sm. 746; 17 Jur. 174.

of them, which he is at liberty to have at any time. The Defendant has done all that was incumbent upon him, when, in answer to an interrogatory framed like this, he has given such statements as are contained in his answer. This exception, like the other, must be overruled; and although, at the present stage of the cause, it is not for the Court to speculate upon the probability of the success of the suit, I may say that the nature of the case alleged by this bill, and the character of the interrogatories, is not such as to induce the Court to depart from the usual rule of making the costs follow the event. The order of the Vice-Chancellor must be affirmed, and the appeal dismissed with costs.

SIR G. M. GIFFARD, L.J., said that the 29th interrogatory referred to a debt owing by *Swayne & Bovill*, and asked the amount received on account of that debt. The answer in respect of this matter said, that patents which to some extent formed a security for the debt had been taken by the Defendant, and that more had been received upon those securities than the total amount of the debt. But, taking the main part of the case made by the Plaintiff's bill, it was quite clear that this debt could only form one item in a very large account; and that at the hearing of the cause, even if he knew the exact amount which had been received, he could not possibly get a decree for any specific sum of money. That being so, His Lordship thought that, with reference to this part of the case, the answer was abundantly sufficient.

Then, coming to the second part of the case, which was this:—the Plaintiff said, "If I do not succeed on the first point, at all events this debt ought to have been excluded from the agreement altogether, and is a distinct and separate matter;" but it was quite clear, that even if the Plaintiff could succeed, very large allowances must be made to the Defendant in respect of his expenditure, and therefore, even on the second part of the case, no specific amount could by possibility, even if these questions were specifically answered, be recovered by the Plaintiff. But His Lordship went further than that, for on this bill, framed as it was, the utmost that the Plaintiff could recover would be one-half of the total amount of the debt which *Swayne & Bovill* owed, and there were abundant admissions on the face of the answer to give him one-

L. JJ. 1869 LOCKETT v. LOCKETT.

half of the total amount, if at the hearing of this cause he should be held entitled to that relief. Therefore His Lordship was clearly of opinion that the 29th interrogatory was sufficiently answered.

With respect to the second exception, it was material to look at the terms of the question. It was very wide and roving, not dealing with even a balance sheet, or with results, or with anything specific at all, but really and in substance asking for that which would naturally be contained in the partnership books, for if not contained in the partnership books there would be no record of anything of the sort. The Defendant in his answer referred to the books, and said that they had been produced, that the Plaintiff himself kept them up to a given time, that the Plaintiff had had full discovery with respect to them, that as to a large part of them they had been deposited with the Clerk of Records and Writs, and there remained deposited, and that as to the rest of them they were in constant use, but the Plaintiff could see them. The Defendant said that he was willing to be bound by the books, and he said further, "that save by the examination and inspection of the said books I have no means whatsoever of obtaining or giving any further or other knowledge or information than such as is contained in this my answer with respect to any of the particulars inquired after in any of the interrogatories or parts of interrogatories referred to in this paragraph." In His Lordship's opinion that was a sufficient answer, even without depending on the case of *White* v. *Barker* (1). His Lordship was satisfied, however, that the decision in that case was very sound, and that in all matters of this sort the Court must look at the particular circumstances of each case, and must judge for itself what was, and what was not, reasonable. For these reasons His Lordship thought that the decision in the Court below was right, and that this appeal ought to be dismissed with costs, and further, that though the allowance of these exceptions might be a matter of vexation, expense, and trouble to the Defendant, His Lordship was satisfied that their allowance would in no way tend to assist the Plaintiff in the due prosecution of this suit.

Solicitors for the Plaintiff: Messrs. *Norris & Allen.*

Solicitor for the Defendant: Mr. *J. H. Lydall.*

(1) 5 De G. & Sm. 746; 17 Jur. 174.

WHITE *v.* HERRICK.

L. JJ.
1869
March 6.

Ward of Court—Marriage after Twenty-one—Settlement—Jurisdiction.

A ward of Court entitled to a small fund in Court to her separate use, married on the day after she came of age. The Master of the Rolls ordered the fund to be settled; but on appeal it was ordered to be transferred to her.

THIS was an appeal by Mrs. *Radcliffe* from an order of the Master of the Rolls declining to order payment to her of a sum of money in Court, but directing it to be settled.

The Appellant had been made a ward of Court by a suit in which a decree was made, in 1855, for the administration of the estate of *J. W. White,* who, by his will, gave the income of one-third part of his residuary estate to the Appellant for her life for her separate use, with a direction to apply it for her education and maintenance until she should attain twenty-one, or marry.

During the Appellant's minority an allowance was made by the Court, first of £150 a year, and then of £200 a year, for her maintenance and education, out of the income of the above third share. The accumulations of the surplus when she came of age amounted to £363 16*s.* 4*d.* consols, and £53 4*s.* 4*d.* cash.

On the 8th of August, 1866, the Appellant attained the age of twenty-one years, and on the following day she was married. In January, 1867, she presented a Petition asking for payment to her of the accumulations, and for an order for payment of the income of the third share to her. On this Petition an order was made on the 19th of January, directing an inquiry whether the marriage was a valid marriage, and whether any settlement or agreement for a settlement of the Appellant's fortune had been made, and if not, then directing a settlement to be approved of by the Judge.

By an order made in Chambers on the 13th of July, 1867, stating that the Judge was of opinion that he could not restrain the Appellant from anticipating her share of the income of the testator's estate, directions were given for raising the costs of all parties of the Petition as between solicitor and client out of the £363 16*s.* 4*d.* consols, and for carrying the residue to an account to be intituled "The Account of the Settlement Fund," the trusts

L. JJ. 1869 WHITE v. HERRICK.

of which fund were embodied in the order. The £53 4*s.* 4*d.* was ordered to be paid to the Appellant on her separate receipt, and an order was made for payment to her of the income of one-third of the testator's estate. The costs were accordingly taxed and paid, and the residue, £95 17*s.* 3*d.* Bank Annuities, carried over to the settlement account.

On the 24th of July, 1867, a similar order was made for carrying over to the settlement account a sum of £85 4*s.* 1*d.* due to the Appellant from other parties in the cause, and made payable by them by quarterly instalments of £7 10*s.*

The Appellant now appealed from the orders of the 13th of July, 1867, and the 24th of July, 1867, asking that the stock dealt with by those orders might be transferred to her, or a trustee for her, and the cash dealt with by them ordered to be paid to her on her separate receipt.

Mr. *Speed*, for Mrs. *Radcliffe*, in support of the appeal:—

The Court had no jurisdiction to refuse payment to the wife, there having been no contempt of Court in the marriage. The jurisdiction is founded on contempt: *Martin* v. *Foster* (1). The authorities do not support the order of the Master of the Rolls: *Leeds* v. *Barnardiston* (2); *Austen* v. *Halsey* (3); *Long* v. *Long* (4); *Money* v. *Money* (5). In *Biddles* v. *Jackson* (6) a similar order to the present was made; and on appeal the Lords Justices differed (7); but *Longbottom* v. *Pearce* (8) is decisive in support of the Appellant.

Mr. *Campbell*, for the husband.

SIR C. J. SELWYN, L.J.:—

The fund in this case is so small that it is not desirable to incur the expense and inconvenience incident to its being kept in Court as a settled fund; and *Longbottom* v. *Pearce*, which was a decision of the full Court of Appeal, is ample authority for our directing it to be paid out to the wife.

(1) 7 D. M. & G. 98, 102.
(2) 4 Sim. 538.
(3) 2 S. & S. 123.
(4) Ibid. 119.
(5) 3 Drew. 256.
(6) 26 Beav. 282.
(7) 3 De G. & J. 544.
(8) Ibid. 545, n.

L. JJ.
1869
WHITE
v.
HERRICK.

SIR G. M. GIFFARD, L.J :—

Longbottom v. *Pearce* (1) is conclusive as to the right of the Appellant to receive this fund. She must, however, be separately examined.

Mr. *Speed* suggested that, according to the general practice, her separate examination was unnecessary, the sum being under £200.

Their Lordships considered that, under the circumstances, there had better be the separate examination.

Solicitors: Messrs. *Wild & Barber.*

MANBY *v.* ROBINSON.

L. JJ.
1869
March 5.

Interpleader Suit—Practice—Affidavit of no Collusion—Payment into Court—Undertaking as to Damages.

The Plaintiff's affidavit of no collusion in an interpleader suit cannot be rebutted before the hearing by a counter affidavit; and the Plaintiff is entitled, notwithstanding such counter affidavit, to an order for payment of the money into Court, and for an injunction.

The Plaintiff's right to this protection is not lost by his filing additional affidavits to verify the statements in the bill; but in a case where a charge of collusion was made the Court put the Plaintiff under an undertaking as to damages.

The order of *Malins*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Malins.*

In the month of January, 1869, the Plaintiff, *Charles Manby,* filed a bill of interpleader against *Henry George Robinson* and *William Shakspeare Webster,* stating that previously to June, 1866, he had employed the Defendants and their partner, *George Frederick Robinson,* as his solicitors, and that the bill of costs due from him to them had been taxed under an order of the Master of the Rolls at the sum of £570 5*s.* 7*d.* He further stated that each of the two Defendants claimed the amount due, but that *George Frederick Robinson* made no claim to it. He therefore prayed in the usual form that the two Defendants might interplead, and

(1) 3 De G. & J. 545, n.

L. JJ. 1869 MANBY v. ROBINSON.

might be restrained from suing him for the amount due. The bill was accompanied by the usual affidavit by the Plaintiff that there was no collusion between him and either of the Defendants.

Previously to the filing of the bill a suit of *Robinson* v. *Webster* had been instituted by *H. G. Robinson* against *Webster* and *G. F. Robinson* for taking the accounts of the partnership.

After the Defendants to the bill of interpleader had appeared, the Plaintiff, on the 9th of February, 1869, moved for leave to pay the sum of £570 5*s.* 7*d.* into Court, and for an injunction in terms of the prayer. This motion was supported by an affidavit by the Plaintiff, verifying the facts stated in the bill. The Defendant *Webster* filed an affidavit in answer, stating that the Plaintiff was acting in collusion with the Defendant *H. G. Robinson*, in order to prevent *Webster* from receiving the amount of the bill of costs, and denying that the Plaintiff had received notice from *Robinson* to pay the money to him. The Plaintiff then filed a second affidavit proving the notices which he had received from the two Defendants.

The Vice-Chancellor, on the reading of these affidavits, refused the Plaintiff's motion, on the Defendant *Webster* undertaking not to take any proceedings for recovering the amount of the bill of costs for a month, in order to allow time for *H. G. Robinson* to move for an injunction in the suit of *Robinson* v. *Webster* to restrain *Webster* from receiving the money. From this order the Plaintiff appealed.

Mr. *Pearson*, Q.C., and Mr. *Currey*, for the Appellant:—

The practice is well settled that the Plaintiff's affidavit of no collusion is conclusive before the hearing, and cannot be rebutted by an affidavit on the part of the Defendant. The Plaintiff is therefore entitled as of course to the order for payment of the money in dispute into Court, and for an injunction. If the Defendants insist that it is not a proper case for interpleader the objection ought to be made at the hearing: *Langston* v. *Boylston* (1); *Stevenson* v. *Anderson* (2); *Toulmin* v. *Reid* (3). The Plaintiff has not forfeited his right by filing fresh affidavits. They put no new

(1) 2 Ves. 101. (2) 2 V. & B. 407.
(3) 14 Beav. 499.

facts in issue, but simply verified the statements in the bill. If the Vice-Chancellor's order stands the Plaintiff will lose all the benefit of his interpleader bill.

Mr. *Glasse*, Q.C., and Mr. *Townsend*, for the Defendant *Webster* :—

If the affidavits are received the Court can have little doubt that this is simply an attempt by the Defendant *Robinson* to prevent *Webster* from recovering the money; *Robinson* makes no real claim to it. If the Plaintiff had been satisfied to rest upon his affidavit of no collusion, we might have had a difficulty in resisting his motion. But he has waived his right to rest on this affidavit by filing others, which opened the question as to *Robinson's* claim. Although Lord *Eldon* in *Stevenson* v. *Anderson* (1), followed the rule of practice laid down in *Langston* v. *Boylston* (2), he did not say that he approved of it; and the Court will not extend the rule further than it is obliged by the authorities to carry it. The Plaintiff is not injured by the order of the Vice-Chancellor. He will be protected if he acts under the order of the Court in the suit of *Robinson* v. *Webster*, and he can then bring his own suit to a hearing if he desires to do so.

Mr. *Peck*, for the Defendant *Robinson*.

Mr. *Pearson*, in reply.

SIR C. J. SELWYN, L.J. :—

In this case I think we are bound by the authorities cited. The practice was laid down by Lord *Loughborough* in *Langston* v. *Boylston*, and has been since consistently acted upon; and we should be introducing confusion into the practice in interpleader suits if we were to hold that the affidavit of no collusion can be rebutted by a counter affidavit. It may be regretted that there is not some way of trying the question of collusion before the cause is at issue, but the practice is well settled.

Then the question in this case is, whether the Plaintiff has forfeited this right by filing the two additional affidavits. The first of these affidavits was merely verifying the statement in the bill

(1) 2 V. & B. 407. (2) 2 Ves. 101.

L. JJ.
1869
MANBY
v.
ROBINSON.

to the effect that each of the Defendants claimed the money; and that fact being disputed, he filed a second affidavit verifying the notices which were sent to him by the Defendants. I think that by filing these affidavits he cannot be held to have forfeited his right to protection. Has, then, the Vice-Chancellor given to the Plaintiff the protection to which he is entitled? In my opinion he has not done so. I think that the Plaintiff ought not to be left in the position in which he is left by the order, but is entitled to be allowed to protect himself by paying the money into Court. I think, however, that in such a case as this, although it is an interpleader suit, we ought to apply the modern practice of putting the Plaintiff under an undertaking to abide by any order the Court may make as to damages; especially as we have given him the protection of refusing to hear any contradiction of his affidavit of no collusion. If the Plaintiff refuses the undertaking, the motion will be dismissed with costs.

SIR G. M. GIFFARD, L.J. :—

There can be no doubt after the notices that have been given to the Plaintiff that this is a clear case for interpleader. With respect to the affidavit of no collusion, the authorities are conclusive. I therefore agree that the Plaintiff should be put under an undertaking as to damages, and that the order of the Vice-Chancellor should be reversed, and an order made for the payment of the money into Court, and for an injunction.

The Plaintiff, through his counsel, consented to give the undertaking required.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne,* agents for Messrs. *Currey & Holland.*

Solicitors for the Defendants: Mr. *J. Beattie ;* Mr. *W. S. Webster.*

GRIFFIN *v.* MORGAN.

L. JJ.
1869
Feb. 1.

Practice—Order of Revivor.

A suit for administration was instituted in the name of three infants by their next friend. After this one of them, a female, married before decree. The next friend and the other parties to the suit were unaware of the marriage, and she and her husband were unaware of the existence of the suit until after a decree had been made. Vice-Chancellor *Stuart* declined to make an order of revivor, considering that the defect could not be remedied without a supplemental bill; but, the Defendants consenting, an order of revivor was made by the Lords Justices.

THE bill in this suit was filed on the 19th of December, 1866, by three infants, by their father as next friend, for the administration of an estate in which they claimed to be interested. One of the Plaintiffs was *Joyce Griffin*, and she, on the 22nd of April, 1867, intermarried with *Thomas Huntley*. At this time she and *Huntley* were both unaware of the institution of this suit, and the next friend and the other parties to the suit were ignorant of her marriage. On the 19th of November, 1867, an administration decree was made. In the course of the proceedings in Chambers under this decree the parties became for the first time aware of the marriage of Mrs. *Huntley;* and on the 21st of January, 1869, the Plaintiffs moved before Vice-Chancellor *Stuart* that the suit might be revived by the Plaintiff *Joyce Griffin*, now the wife of *Thomas Huntley*, and the other Plaintiffs, by their next friend, against the Defendants, and that *Huntley* might be bound by the decree and by all the proceedings taken thereunder. *Huntley* filed an affidavit by which he expressed his regret at having unwittingly committed a contempt of Court, and offered to execute a proper settlement of his wife's share in the property in question in the suit, and submitted to be bound by the decree and the proceedings taken under it. The Vice-Chancellor was of opinion that a supplemental bill was necessary, and the application for an order of revivor was now renewed by the Plaintiffs.

Mr. *Kekewich*, for the Plaintiffs.

Mr. *Fry*, for the Defendants, suggested that the decree was

L. JJ. 1869 GRIFFIN v. MORGAN.

altogether a nullity, and that the suit could not be revived; but stated that the Defendants were willing to consent to any order the Court might think proper.

Their Lordships made the following order:—

"The said *Thomas Huntley*, by his counsel, appearing and submitting to be bound by the said decree, and the Defendants, by their counsel, consenting, Order that this cause do stand revived at the suit of the said *Joyce Huntley* and the other Plaintiffs, all by the said *James Griffin*, their next friend, against the Defendants and the said *Thomas Huntley*, and that the said decree and all proceedings thereunder be carried on and prosecuted between the Plaintiffs and the Defendants and the said *Thomas Huntley*, and that the Plaintiffs do have the same benefit of the said decree and of the proceedings thereunder against the Defendants and the said *Thomas Huntley* as if, prior to the date of the said decree, an order to revive this cause had been duly obtained and served, and the said *Thomas Huntley* had been made a Defendant, and had appeared on the hearing of the motion on which such decree was made.

Solicitors for the Plaintiffs: Messrs. *Singleton & Tattershall.*
Solicitors for the Defendants: Messrs. *Thomas White & Sons.*

L. JJ. 1869 *Feb.* 12, 19.

5 Ch 404

Ex parte BARNETT. *In re* TAYLOR. (2.)

Bankruptcy—Appeal from an Order of the Registrar—Practice.

No appeal can be brought to the Court of Appeal in Bankruptcy from an order of a Registrar unless the Registrar made the order when sitting as deputy for the Commissioner. All other orders of the Registrar must be reviewed by the Commissioner, or, if the matter has been transferred into the County Court, by the Judge of the County Court.

Ex parte Moss (1), and *Ex parte Barnett* (2), observed upon.

THIS was an appeal from an order made by Mr. Registrar *Hill*, of the *Birmingham* Court of Bankruptcy, in the bankruptcy of *Joseph Taylor*, on the 8th of January, 1869.

The Registrar having taxed the costs of Mr. *Burton*, the Appellant, at £28 17*s.* 10*d.*, proceeded to indorse the allocatur with an order for the payment of the above sum. This order was

(1) Law Rep. 3 Ch. 29. (2) Law Rep. 4 Ch. 68.

appealed from by the creditors' assignee as being beyond the jurisdiction of the Registrar.

On the same day the Registrar, sitting as deputy for the Commissioner (under the 27th section of the *Bankruptcy Act*, 1849), had made an order for the transfer of the matter to the *Walsall* County Court; but in the order appealed from it did not appear that the Registrar was in that case acting as Deputy Commissioner. When the appeal was called on a preliminary objection was taken by the Respondent, that the order having been made by the Registrar on his own authority, the case ought to have been brought before the Commissioner, and that no appeal lay to this Court. Their Lordships, therefore, directed the matter to stand over in order that the Appellant might get the order amended by stating that the Registrar was acting for the Commissioner, if such was the case.

On the matter coming on again

Mr. *Everitt*, for the Appellant, stated that the Registrar declined to amend the order, considering that he was acting on his own authority.

Mr. *Bardswell*, for Mr. *Burton*, renewed his objection to the jurisdiction of the Court to entertain an appeal from an order of the Registrar. He referred to *Ex parte Morgan* (1) and to the *Bankruptcy Act*, sects. 6, 12, and 14, and the *Bankruptcy Act*, 1861, sects. 14, 52, and 53.

Mr. *Everitt*, for the Appellant:—

There is no case distinctly deciding that no appeal lies from the Registrar to this Court. On the contrary, there are some instances reported where the Court has exercised this jurisdiction: *Ex parte Moss* (2); *Ex parte Barnett* (3). The 53rd section of the *Bankruptcy Act*, 1861, is the only section which gives power to the Commissioner to review the orders of the Registrar; and then it is only upon a case stated by the parties and certified by the Registrar; a course which was not applicable to an *ex parte* order like the present. There is also an additional difficulty in this case,

(1) 32 L. J. (Bkcy.) 61. (2) Law Rep. 3 Ch. 29.
(3) Law Rep. 4 Ch. 68.

L. JJ. 1869 *Ex parte* BARNETT. *In re* TAYLOR. (2.)

for the matter has now been transferred to the County Court under the 109th section of the *Bankruptcy Act*, 1861, so that the jurisdiction of the Commissioner is gone.

SIR C. J. SELWYN, L.J.:—

In this case, when the appeal came before us on the former occasion, we gave the Appellant the opportunity of setting himself right by shewing by what authority the order was made. It was either made by the Registrar sitting for the Commissioner, or on his own authority. If it was made by the Registrar sitting for the Commissioner we gave the Appellant the opportunity of getting that fact stated in the order. This has not been done, and we must therefore take it to have been made by the Registrar on his own authority, and the question we have to decide is, whether we ought to entertain the appeal from his order. The 12th section of the Bankruptcy Act, 1849, says that "the Court" shall have the superintendence and control in all matters in bankruptcy, and it is from "the Court" that the power of appeal is given to this Court.

With respect to the case of *Ex parte Moss* (1), we are informed by the Registrar in Court that the order, although not so stated in the report, was made by the Registrar sitting for the Commissioner. As to the other case, *Ex parte Barnett* (2), the point was not brought to the attention of the Court; for if it had been, neither the Lord Chancellor nor I would have consented to hear the appeal; for I strongly entertain the same opinion as has been expressed by the Lord Chancellor, that we ought not to constitute this Court a Court of primary jurisdiction, and that we ought not, except under very special circumstances, to make orders without the advantage of a formal discussion and decision in an inferior Court. The 52nd section of the *Bankruptcy Act*, 1861, gives the Registrar power to perform certain functions; and by the 53rd section any party shall be at liberty to take the opinion of the Commissioner. So far, therefore, from finding in the Act any such independent authority in the Registrar as is contended for, we find that he is simply an officer of the Commissioner, and the parties have the power at any time of taking the opinion of the Commissioner

(1) Law Rep. 3 Ch. 29. (2) Law Rep. 4 Ch. 68.

during the proceedings; in the same way as if a Chief Clerk of the Vice-Chancellor makes an order which is beyond his power the Vice-Chancellor is the proper person to discharge it, and the application ought not to be made to the Court of Appeal.

The only question that remains is, whether the transfer of the matter to the County Court makes any difference. The Act gives the same jurisdiction to the County Court Judge as to the Commissioner. If, therefore, the case has now been transferred to the County Court, the Judge of that Court has power to discharge the order; if it has not been transferred the power still remains with the Commissioner, but there is no ground for supposing that it is the duty of this Court to exercise any such jurisdiction. The result is, that if the Registrar was acting for the Commissioner, the Appellant had the opportunity of shewing that such was the case, and he has not done so. If the order was made by the Registrar on his own authority he has exceeded his powers, and the Appellant ought to have applied to the Commissioner or the County Court Judge. In either case this application fails, and must be discharged with costs.

SIR G. M. GIFFARD, L.J.:—

I am of the same opinion. As the order has not been amended so as to shew that it was made by the Registrar sitting as Deputy Commissioner, we must assume that it was made by him on his own authority, and not by the authority of the Commissioner. Under these circumstances I have no hesitation in saying that the appeal ought not to have been brought here. I agree with what has been said by the Lord Justice, that it is not the duty of this Court to review orders of the Registrar; that ought to be done by the Commissioner.

Solicitor for the Appellant: Mr. *W. H. Duignan*, agent for Messrs. *Duignan, Lewis, & Lewis, Walsall.*

Solicitors for the Respondent: Messrs. *T. White & Sons*, agents for Mr. *F. M. Burton, Walsall.*

L. JJ.
1869
Feb. 12, 13, 19.

MARTIN *v.* POWNING.

Bankruptcy Act, 1861—*Registered Deed—Concurrent Jurisdiction—Administration of Trusts of Creditors' Deed.*

The Court will not, in ordinary circumstances, entertain a suit for the administration of the trusts of a deed registered under the *Bankruptcy Act*, 1861.

The bill alleged that the Defendants, the trustees of a creditors' deed, had made large profits by supplying the estate with goods while the debtor's business was going on under their superintendence, and that they had made large payments out of the estate in exoneration of the liability which they themselves were under as sureties for the payment of certain instalments by the debtor:—

Held (reversing the decision of *Stuart*, V.C.), that these circumstances did not take the case out of the general rule, the Court of Bankruptcy having sufficient powers to enable it to deal with such questions.

The question whether the Court ought to exercise its jurisdiction or leave the case to another tribunal may be raised by demurrer where the facts sufficiently appear by the bill; and a Defendant is not bound to wait to the hearing, or raise the question by motion to stay proceedings.

A bill to carry into execution the trusts of a registered deed misstated the time of registration so as to make the registration appear irregular. A plea stating the correct date, averring that the provisions of the Act had been complied with, and submitting that the case ought to be left to the Court of Bankruptcy, was allowed.

THIS case came before the Court on two appeals; one by the Defendants *Thomas Barker* and *John Bramall*, and one by the Defendant *Frederick Powning*, both against an order of Vice-Chancellor *Stuart*, of the 17th of December, 1868, whereby two several pleas put in by the Defendants were overruled with costs (1).

(1) The judgment of the Vice-Chancellor was as follows:—

1868. Dec. 17. SIR J. STUART, V.C.:—

The questions that have been argued in this plea on the meaning of the statute are of very great importance. Various authorities have been cited and commented upon, and there is an apparent want of uniformity in the decisions, which has also been commented upon, and which, I think, requires some observation. Upon serious examination, and looking accurately at what was decided in the cases, there is no contrariety of decision at all. The 197th section of the *Bankruptcy Act*, 1861, was clearly intended to commit to the Court of Bankruptcy the administration of the property of debtors who executed trust deeds for the benefit of their creditors, provided the solemnities and proceedings indicated by the Act are properly followed. The 197th

The bill was filed by *Stephen Martin*, on behalf of himself and all other the creditors of *John Parkin* entitled to the benefit of a trust deed of the 19th of December, 1866; and it stated that

---

section of the Act puts trustees under such deeds upon the footing of assignees for creditors in bankruptcy; it gives to those trustees all the rights, and subjects them to all the liabilities incurred by assignees in bankruptcy. The duties of assignees in bankruptcy are well defined. If there be nothing to be done in administering the property of a debtor under such a trust deed but what falls properly within the province of assignees in bankruptcy, the Legislature, I think, contemplated that the administration of the assets under such a deed should be entirely under the Court of Bankruptcy. The assimilation of the character of trustee to that of assignee is very plainly indicated by the Act, but there the Act stops. If the trustees under a creditors' deed have any duties or trusts to perform which are not within the range of the duties of an assignee in bankruptcy, the Act of Parliament seems to me to have no reference to such a case at all, and does not seem to me to have committed to the Court of Bankruptcy a duty which that Court could ill discharge, that is, of seeing in a case of unusual trusts grafted on such a deed what shall amount to a breach of trust according to the trusts declared, or how, in the execution of those trusts, the trustees shall be dealt with as to any complaint of their conduct. Such matters are foreign to the duty of assignees in bankruptcy, and it is not easy to conceive what good or beneficial purpose could have been effected if the Legislature had absolutely committed, no matter what complication of trusts there might be, the administration of such trusts to the Court of Bankruptcy. The administration of assets, and the performance of certain trusts declared by deed, or by writing, are entirely different things. What takes place upon the administration of assets is simply to collect the assets and pay the creditors. These duties are perfectly simple, and the Court of Bankruptcy, as against assignees, or as against trustees, who are placed in the situation of assignees by this enactment, has extensive power as to controlling, regulating, and, if necessary, punishing, these assignees, who are officers of the Court, as to their conduct in the ordinary administration of assets. But I am not aware that the Court of Bankruptcy has, or has been supposed to have, any of those powers which this Court exclusively has of regulating the performance of trusts declared, and of administering trust property according to trusts of a more complicated kind than simply the payment of creditors. But even where trustees under a deed of this kind have no more than the ordinary duties of assignees in administering assets to discharge, there is nothing in the Act of Parliament that excludes the jurisdiction of this Court.

In the case that occurred lately, on which the Court of Appeal expressed its opinion, where the author of a deed of inspectorship set his inspectors at defiance, kept possession of the property, interfered with their management of it, and obstructed and baffled all the proceedings for the benefit of his creditors which the inspectorship deed had provided for, this Court was appealed to, to put the property *in medio*, and to protect it against the misconduct of the author of the deed. The inspectors

L. JJ. 1869 MARTIN v. POWNING.

Parkin, on the 19th of December, 1866, was indebted to the Plaintiff in the sum of £78 3*s.* 11*d.*, and was also indebted to various other persons. It then stated an indenture, dated the same 19th

---

were the Plaintiffs, the author of the deed was the Defendant. There seems to have been nothing in that deed beyond the ordinary trust for the administration of the property for the benefit of the creditors, no complication of trusts, no unusual duties imposed upon the trustees, nothing but a case where simple administration was all that was necessary. But this Court, having its assistance invoked, and being asked to appoint a receiver, and to interpose its authority against the improper proceedings of the author of the deed, interfered to the extent of appointing a receiver. No doubt the Court was asked in that case to perform the trusts of the deed, and the appointment of the receivership upon the jurisdiction exercised by the Court was an appointment of a receivership for the purpose of the performance of the trust, the performance of which by this Court was asked by the bill. In my opinion that bill was properly so framed, because the Court, by its paramount authority, exercising that jurisdiction which seems to me in no degree properly to belong to the Court of Bankruptcy, and arming the inspector with all the authority and power which a receiver appointed by this Court would have, is bound to see that the property of which it takes possession is administered according to the trusts which are fastened upon it. But it may very well happen in the progress of that cause that this Court may see that the property being safe, and preserved by the exercise of the jurisdiction of this Court, the simple process of dividing it among the creditors, and ascertaining who are creditors, may be more properly performed by the Court of Bankruptcy than by this Court. But upon that the Court has as yet pronounced no decision; that suit is still pending.

Now, with that explanation, it seems to me that the decision in the case of *Riches* v. *Owen* (Law Rep. 3 Ch. 820) is one which has proceeded upon the soundest principles. It rejects the notion of this Court's jurisdiction being in any degree abridged by the 197th section, or any of the other sections of the Act of 1861. No abridgment of the powers of this Court is indicated, or is to be collected from the provisions of that Act; but it is certain that that Act has provided a jurisdiction, which can only be considered as a concurrent jurisdiction, for the purpose of the simple administration of the trust. In a subsequent case, where there seemed nothing prayed for by the bill, no relief sought except what was incident to the simple administration of the property, no difficulties stated by the deed, and nothing asked of this Court by the bill but a simple performance of that duty which could well be performed by the Court of Bankruptcy, the Court, finding nothing specially alleged in the bill to induce this Court to exercise that jurisdiction which might easily be exercised by the Court of Bankruptcy, refused to entertain jurisdiction, and allowed a demurrer to the bill. But it seems to me that it would be a very great mistake if it were supposed that by that decision this Court was to be considered as being held by any Judge of this Court to be deprived of any part of its proper jurisdiction in the administration of trusts.

Post 370

of December, 1866, and made between *Parkin* of the first part, *Lewis Cooke* of the second part, the Defendant *Powning* of the third part, the Defendant *Barker* of the fourth part, the Defendant

---

Lord *Cottenham*, in a case of concurrent jurisdiction which arose before him, stated the principles on which this Court ought to act where there is a concurrence of jurisdiction. I refer to *North Eastern Railway Company* v. *Martin* (2 Ph. 758). In that case there was an action at law to recover the balance of an account. There was a bill filed in this Court to have the account taken. The case was one in which there was a concurrence of jurisdiction, and Lord *Cottenham* stated that wherever there is a concurrence of jurisdiction, and this Court has to decide which of the two jurisdictions is to prevail, the convenience of the parties and the circumstances of the case must indicate what the course of the Court should be. The marginal epitome of the case is this: "The equitable jurisdiction in matters of account is concurrent with that of Courts of Law, and no precise rule can be laid down as to the cases in which it will be exercised, this Court reserving to itself a large discretion upon the subject, in the exercise of which it will pay due regard to the nature of the case and the conduct of the parties, and will not restrain an action already commenced merely on the ground that, from the number and complexity of the items in the account, a Judge at Nisi Prius would urge the parties to refer it." In that case Lord *Cottenham* refused to exercise the jurisdiction of the Court, and refused the motion for an injunction to restrain the proceedings at law; and he was influenced by this, that the action at law had been long commenced, and had far proceeded before the bill was filed, and that, by the Plaintiff's delay in applying to this Court, among other circumstances, the convenience of the case seemed to be to allow the proceedings to go on at law. That case shews that where the question is as to concurrent jurisdiction, this Court must be influenced by the circumstances of the case in exercising its discretion.

As to the pleas in this case, they seem to me to have an incurable vice. The plea in each case is simply a plea of a concurrent jurisdiction, which is no plea at all. It is not a bar to the proceedings. A plea of a concurrent jurisdiction, stating some single fact which would settle the question as to the propriety of the exercise of jurisdiction by one Court over the other, might be a good plea, but a plea which simply avers, as the plea in this case does, that the Plaintiff may apply to the Court of Bankruptcy, and that the Court of Bankruptcy could give him a sufficient remedy, is not an answer to a bill which asks that the jurisdiction of this Court may be exercised. It presents no fact to the Court upon which the Court can exercise its judgment upon the convenience or propriety of the exercise of its concurrent jurisdiction, and, therefore, in the progress of the litigation can serve no good purpose whatever, and for that reason alone it would be my duty to overrule these pleas.

Mr. *Palmer* asked for leave to amend the plea; but it would be futile to do that, for this is a case in which, looking at the terms of the Act of Parliament, and giving a fair construction to the arguments in support of the plea founded upon the Act of Parliament, it seems perfectly plain that the Court cannot now decide that it will not exercise jurisdiction. This is a case of a

L. JJ.
1869
MARTIN
v.
POWNING.

Bramall of the fifth part, and all the creditors of *Parkin* of the sixth part, whereby, after reciting that *Parkin* was unable to pay his creditors in full, and had proposed to pay them a composition

---

trust deed of a very unusual kind. The relief prayed by the bill is of a kind which seems to me wholly foreign to the jurisdiction which the Court of Bankruptcy exercises, namely the collection and administration of assets. This trust deed imposed upon the trustees a duty as to carrying on the business of the debtor, and has complicated provisions for that purpose. That is a thing wholly foreign to the ordinary duties of an assignee; and this Act of Parliament in the 197th section, intended that everything in a complicated trust of that kind, the performance of which, whether it shall be properly performed, or whether there be any breach of trust in the performance of it, should be the province of this Court, and of no other Court that I know, to decide upon.

The relief prayed by the bill is also relief in respect of matters not properly cognisable by the Court of Bankruptcy. What a trustee does, properly or improperly, in the execution of the trust, is matter for the consideration of this Court. It is said here that these trustees, to whom, by the trusts of this deed, is committed the duty of carrying on the business of the debtor, have themselves improperly supplied goods for the purpose, and have been making a profit on those goods, and have thereby violated one of the rules of this Court with respect to trusteeship which this Court has always observed. I know of no principle and no authority committed to the Court of Bankruptcy which enables the Court of Bankruptcy to deal with that matter. Another is perhaps less exclusively within the province of this Court, but seems, certainly, properly within it—a complaint that the trustees have incurred debts in carrying on this business which they have left unpaid, and have been dividing the profits of the business among the previous creditors, leaving those persons with whom they contracted debts for the purpose of carrying on the business still unpaid. I do not say that it would be impossible for the Court of Bankruptcy to give relief in a case of that kind, but I am quite certain that, considering it involves questions as to the due administration of this unusual trust, it would not be proper for this Court to delegate to the Court of Bankruptcy, or any other Court, a question of that kind arising upon the performance of a trust.

It has been said that in older cases, which have been cited, the Court of Chancery has, as against assignees in bankruptcy, in the bankruptcy jurisdiction, and without resorting to proceeding by bill, set aside sales, charged assignees with interest, and treated them in their character of trustees as liable under the bankruptcy jurisdiction, in respect of matters which would seem more properly cognisable by the Court of Chancery. But there, again, the question is one simply of convenience. Nobody can doubt the power of the Court of Bankruptcy, or of the Lord Chancellor sitting in bankruptcy, and not exercising his equitable jurisdiction to punish the assignee, who is an officer appointed by him to discharge certain well-defined duties, and to make him account for balances in his hands, and to charge him with interest upon those balances. But Lord Chancellors,

of 10*s.* in the pound by instalments of 2*s.* 6*d.* each, *Parkin*, with the Defendant *Barker* as his surety as to the first instalment, and with the Defendant *Bramall* as his surety as to the second instal-

---

in the exercise of their jurisdiction in bankruptcy, where they have seen that the conduct of the assignees involved matters of breach of duty, and raised questions as to the extent of liability, which would be more conveniently decided under the equitable jurisdiction of this Court, have directed bills to be filed for the purpose. The case of *Hankey* v. *Garratt* (3 Bro. C. C. 456), which has been referred to during the argument, was a case of that kind. In that case, upon a petition in bankruptcy, where the question was as to the application of a joint and separate estate of a partnership, where one only of the partners had become bankrupt, the Lord Chancellor thought the matter was not one that ought to be dealt with in the jurisdiction in bankruptcy, but should be dealt with upon bill. That is a matter of discretion with the Lord Chancellor. He is to consider, as a matter of convenience, in which way the question should be properly decided. But when that bill came on to be heard the wisdom of what the Lord Chancellor did became perfectly apparent, because it turned out that there had been large sums of money in the hands of the assignees employed for a course of years for their own profit, and that bill sought to make them account for those profits, and the decree of the Court made them account accordingly. It is perfectly plain that but for the bill that was filed, relief to that extent could not have been properly given in bankruptcy. No doubt there are cases in which the Lord Chancellor sitting in bankruptcy, has, without resorting to the equity jurisdiction, gone very far in deciding questions that would seem more properly to fall under the equitable jurisdiction, that, for instance, of setting aside a sale. But the Lord Chancellor, in not incumbering the case with the delay and expense of a suit, only exercised that jurisdiction as to setting aside the sale from his paramount authority in bankruptcy over the assignee as his own officer, and from the impropriety of the assignee's conduct in bidding at a sale, or interfering with the due realization of the property by the sale, which was to take place exclusively in bankruptcy; that being so, the Court dealt with it in bankruptcy.

In short, without going through the cases in detail, it may be observed as the result of them all, that, as in other cases of concurrent jurisdiction, the Lord Chancellor in bankruptcy has been guided exactly by those principles so clearly stated by Lord *Cottenham* in the case that I have cited, that is, considerations of convenience and expediency, and of that course which was best for the purposes of justice, and would effect the administration of justice with the least possible delay and expense, in deciding in some cases that the jurisdiction in bankruptcy should be extended to meet the case, in other cases, where that was considered to be inconvenient, or not perfectly safe, directing that a bill should be filed.

Here is a case the peculiarity of which seems to me to shew plainly that it would be improper for this Court to stop this bill, in the present stage, by any dilatory defence, or anything alleged in bar against the exercise of the jurisdiction. What it may be ex-

L. JJ. 1869 MARTIN v. POWNING.

ment, covenanted with the creditors to pay the first instalment on the 1st of April, 1867, and the second instalment on the 1st of July, 1867; and by himself, without sureties, covenanted for the payment of the third and fourth instalments. There was then an assignment of all *Parkin's* real and personal estate to the Defendants upon the trusts after declared; and *Parkin* covenanted not to revoke the deed, and to carry on or wind up his business under the superintendence of the trustees, and under their control to realize the assets; and it was provided that the trustees might employ persons for effectuating the purposes of the deed, and might draw, accept, or indorse bills or promissory notes, and make advances of money in respect of the business, and out of the moneys to be received from the business, or from the realization of the estate, should pay all expenses of the deed, and all debts and expenses incurred in carrying on or winding up the business, and should apply the surplus to satisfying the provisions of the deed, and, subject thereto, should hold the same for *Parkin*, his executors and administrators; and various other powers of management were given to the trustees. The deed also provided, that if all the instalments were duly paid the trustees should assign the residue of the estate to *Parkin* discharged from all claims of the creditors; but if any of the instalments were not duly paid, the trustees were to realize the estate, and divide the net proceeds rateably among the creditors; and it was declared that the deed was intended to operate as an inspectorship and composition deed executed by a debtor under the *Bankruptcy Act*, 1861, and that all questions relating to it should be decided according to the provisions of that Act.

The deed was executed by *Parkin* and the Defendants, and was assented to by the requisite majority of creditors, and the other

---

pedient to do, how far the Court may think that the jurisdiction in bankruptcy may be resorted to in the administration of this estate in any subsequent stage, as in the case of *Riches* v. *Owen* (Law Rep. 3 Ch. 820), it is not necessary now to decide. All that I am called upon to decide now is, whether the doors of this Court should be shut against this Plaintiff or not. I am decidedly of opinion that nothing has been alleged in this plea, or represented in the course of the argument, that would justify me in making any other order than to overrule this plea with costs.

requisites of the 192nd section of the *Bankruptcy Act*, 1861, were complied with; and it was duly registered on the 11th of January, 1867, but was incorrectly stated in the bill to have been registered on the 9th of October, 1867. The bill proceeded to state, that after the execution of the deed *Parkin* continued to carry on his business of merchant and manufacturer under the superintendence of the Defendants, and that the first and second instalments of the composition were paid on or shortly after the dates when they became due, but that the money required for paying them was borrowed for the purpose by the Defendants from their bankers, the *Midland Banking Company*, and that the money so borrowed was repaid by them out of sums received by them on account of the business and in exoneration of the personal liability of the Defendants *Barker* and *Bramall* under the trust deed. The bill also stated other dealings by the Defendants with the trust estate, and various particulars in which the Plaintiff alleged that they had acted in violation of the trusts and duties imposed upon them by the trust deed, particularly that *Barker* and *Bramall* supplied the trust estate with large quantities of goods while the debtor's business was being carried on under the superintendence of the Defendants, and made large profits thereby, and it prayed in effect that the trusts of that deed might be executed and the trust estate administered by the Court.

In consequence of the misstatement in the bill as to the date of registration, from which it appeared that the registration did not take place within the twenty-eight days allowed by the Act of 1861, and which misstatement, it appeared, was occasioned by a misprint, the Defendants were advised that they could not safely demur to the bill, and they accordingly filed the pleas overruled by the order under appeal. These pleas were, *mutatis mutandis*, in the same form, they gave the correct date of registration, and stated that all the requisites of the Act were complied with in respect of the deed, and averred that the deed accordingly became a binding deed upon all the creditors of *Parkin*, so that the debtor and all his creditors and the trustees were subject to the jurisdiction of the Court of Bankruptcy, and had the benefit of, and were liable to, all the provisions of the *Bankruptcy Act*, in the same manner as if the debtor had been adjudged a bankrupt, and

L. JJ. 1869 MARTIN v. POWNING.

the creditors had proved, and the trustees had been appointed creditors' assignees, following the words of the 197th section; and they concluded with the averment and submission that this Court ought not to entertain jurisdiction of the matters mentioned in the bill, and that the Plaintiff could have a complete and effectual remedy in the Court of Bankruptcy, to which he ought to appeal.

Mr. *J. H. Palmer*, Q.C., and Mr. *Ince*, for *Powning*:—

Bell v. *Bird* (1) is distinct in our favour. *Galsworthy* v. *Durrant* (2) helps us. When the Court has interfered as to registered deeds, it has only been in a way ancillary to the administration of the trusts: *Riches* v. *Owen* (3); *In re Price's Trust Deed* (4); *Ex parte Morgan* (5). It is the policy of the bankrupt law to have business administered by local Courts, and this will be wholly defeated as regards creditors' deeds if this Court takes on itself to administer the trusts: *Ex parte Cox* (6); *Thompson* v. *Derham* (7); *Preston* v. *Wilson* (8); *Laycock* v. *Johnson* (9); *Wearing* v. *Ellis* (10); *Dyson* v. *Hornby* (11). No relief is sought here which could not be obtained under the jurisdiction in bankruptcy: *Ex parte James* (12). The plea is good in form: *Beames* on Pleas (13); *Newland's* Chancery Practice (14).

Mr. *Greene*, Q.C., and Mr. *Ince*, for *Barker* and *Bramall*, referred to *Hankey* v. *Garratt* (15), and *Ex parte Lawrence* (16).

Mr. *Wickens*, and Mr. *Russell Roberts*, for the Plaintiffs:—

This Court has always refused to give up its jurisdiction on the mere ground that concurrent jurisdiction has been given to another Court. If the Act had intended to exclude the jurisdiction of this Court, there would have been words shewing it. The argument from inconvenience goes for nothing, unless some special incon-

(1) Law Rep. 6 Eq. 635.
(2) 2 D. F. & J. 466.
(3) Law Rep. 3 Ch. 826.
(4) Ibid. 6 Eq. 460.
(5) 1 D. J. & S. 288, 305, 306.
(6) 31 L. J. (Bkcy.) 49.
(7) 1 Hare, 358.
(8) 5 Ibid. 185, 192.
(9) 6 Hare, 199, 210.
(10) 6 D. M. & G. 596.
(11) 7 Ibid. 1.
(12) 8 Ves. 337.
(13) Page 325.
(14) Vol. ii. p. 181.
(15) 3 Bro. C. C. 456.
(16) 1 D. J. & S. 307.

venience be shewn, for there is always inconvenience in having concurrent jurisdictions. There was an inconvenience when the Court of Exchequer had concurrent jurisdiction in Equity with this Court.

[The LORD JUSTICE SELWYN:—Suppose a bill was filed, and then proceedings taken in the Court of Bankruptcy, would this Court restrain them?]

Yes; the Court which first obtains seisin of the matter must retain it. Under these trust deeds many cases must arise with which the Court of Bankruptcy cannot deal. For instance, a trustee is entitled to indemnity from his *cestuis que trust*, as is strongly illustrated in the *German Mining Company's Case* (1).

[The LORD JUSTICE GIFFARD:—That is an argument in favour of giving full effect to the words in sect. 197, which tend to place the trustees in the same position as assignees; for it would be a very strong thing to enable a majority to impose on a minority such a liability as that enforced in the case of the *German Mining Company*.]

Negative words cannot be imported into the Act so as to take away the jurisdiction of the Court: *Galsworthy* v. *Durrant* (2). The plea does not aver want of jurisdiction in this Court; neither does it allege that another Court has seisin of the matter: *Mitford* on Pleading (3).

[The LORD JUSTICE SELWYN:—Is not the question really this, whether, if the date of registration had been correctly stated in the bill the Defendants could have demurred?]

We contend that it is not a good ground of demurrer, that the Court might, at the hearing, decline to exercise its jurisdiction. We say, further, that there is no reason why the Court should not administer the trusts of these deeds, for which it has more perfect machinery than the Court of Bankruptcy has: *Tucker* v. *Hernaman* (4); *Forshaw* v. *Mottram*, before Vice-Chancellor *Stuart*, June 13, 1867. (5)

(1) 4 D. M. & G. 19. 17 Jur 745
(2) 2 D. F. & J. 436. 7 Jur N.S. 713
(3) Page 262, 5th Ed.
(4) 4 D. M. & G. 395, 403. 17 Jur 728.
(5) 2 Jur N 191.

L. JJ. 1869

MARTIN v. POWNING.

[The LORD JUSTICE GIFFARD:—In that case there was a partner outside the deed.]

[*Venning* v. *Lloyd* (1) was also referred to by the Court.]

Mr. *J. H. Palmer*, in reply

Feb. 19. SIR C. J. SELWYN, L.J.:—

The judgment I am about to deliver is the judgment of the Court.

[His Lordship, after stating the facts of the case in nearly the same words as they are given above, continued:—]

Some formal objections have been taken in argument to these pleas, but we think that there is no just ground for such objections, and that the effect of the pleas is simply to correct the mistatement in the bill as to the date of the registration of the deed, and to place the parties in the same position in which they would have been if that date had been correctly stated, and as if the substantial question which we have now to decide had been raised by demurrer; and we think that the averment and submission with which, as we have already stated, the pleas conclude, cannot be held to be informal so as to vitiate the pleas. Lord *Redesdale* says (2): "It sometimes happens that a bill which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid shewing upon the face of it any cause of demurrer. In this case the Defendant is compelled to resort to a plea by which he may allege matter which, if it appeared on the face of the bill, would be good cause of demurrer. For in many cases, what is a good defence by way of plea is also good as a demurrer, if the facts appear sufficiently by the bill." It was also argued that the question raised by this submission was one which could not be properly raised by demurrer or plea, but that it was a question for the hearing of the cause, or for a motion to stay proceedings in the suit. We think, however, that where all the material facts are stated on the pleadings, whether upon a bill alone, or, as in this case, upon a bill with a necessary addition and correction supplied

(1) 1 D. F. & J. 193. (2) Mitf. Pl. p. 255, 5th Ed.

by a plea, and where a Defendant is willing to admit the facts thus stated, it is competent for him to take the opinion of the Court at the earliest opportunity, either by demurrer or plea, upon the question of the propriety of the Court's entertaining the suit, and that he is not bound to wait until the hearing of the cause, nor to move to stay proceedings.

Passing, then, to what is the substance of the case, we have to decide, first, whether, in the case of a trust deed registered under the provisions of the *Bankruptcy Act*, 1861, this Court ought to entertain a suit for the execution of the trusts of the deed? and, secondly, whether, if the Court would, under ordinary circumstances, decline to entertain such a suit, the circumstances of this case, or the provisions of this deed, are so peculiar and exceptional as to induce the Court to entertain it?

With respect to the first question, it has been correctly stated by the Respondents' counsel that before the *Bankruptcy Act*, 1861, this Court habitually exercised jurisdiction over composition deeds and trust deeds for the benefit of creditors in the same manner as over other trusts; and in *Riches* v. *Owen* (1), which was a case of a deed registered under the Act of 1861, the Court appointed a receiver, but in that case the deed was a deed of inspectorship, the Plaintiffs were the trustees of the deed, and were suing the insolvent debtor for the purpose of enforcing the deed against him, and the interference of the Court was limited to the appointment of a receiver for the protection of the property; and we have not been referred to any case, nor do we think that any case can be found, in which the Court has entertained a suit for the administration of the trusts of a deed registered under the Act, and in *Bell* v. *Bird* (2) the Court refused to entertain such a suit.

The Act of 1861 has placed the trust deeds registered under its provisions in a position widely differing from that occupied by composition deeds and trust deeds for the benefit of creditors under the old law; for by the Act of 1861, if the proper majority of creditors be obtained, and the other requisites be observed, the deed becomes binding on the minority in the same manner as if they had executed the deed (sect. 192); and the 197th section gives to the deed effects similar to those of an adjudication of

(1) Law Rep. 3 Ch. 820. (2) Law Rep. 6 Eq. 635.

L. JJ. 1869 MARTIN v. POWNING.

bankruptcy, and provides that the debtor, the creditors who execute, assent to, or are bound by the deed, and the trustees, shall, in all matters relating to the estate and effects of the debtor, be subject to the jurisdiction of the Court of Bankruptcy, and have the benefit of and be liable to all the provisions of the Act, and that the creditors and trustees shall have the same "powers, rights, and remedies" as creditors or assignees in bankruptcy, and that "except where the deed shall expressly provide otherwise," the Court of Bankruptcy shall determine all questions arising under the deed according to the law and practice of bankruptcy, and shall have power to make and enforce all such orders as it might have made if the debtor had been adjudged bankrupt, and his estate were administered in bankruptcy.

The powers confided to the Court of Bankruptcy by the Act are very large, and afford to it ample means for correcting any abuses which may occur in the administration of the estates of bankrupts. By sect. 1 of the Act of 1861, it is enacted that the Court of Bankruptcy shall have, for the purposes of that Act, all the powers of the Superior Courts of Law and Equity; and by the 136th section, the Court is empowered to determine all disputes between assignees and creditors, or any of them, or between any persons claiming under a trust deed relating to any bankrupt's or debtor's estate, and to summon and examine upon oath the official or creditors' assignee, trustee, or any other person whomsoever, as to any matter relating to the bankruptcy or trust estate, and to give such directions and make such orders as to the Court shall seem just and expedient, and to award costs personally, or in any other manner, against the official or creditors' assignee, trustee, or any other person. We may also refer to the very extensive power given to the Court of Bankruptcy by the 120th section of the *Bankrupt Law Consolidation Act* of 1849 for summoning before it any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or to be capable of giving information concerning the property or business of the bankrupt, and for enforcing the production of books and documents, and compelling by warrant the attendance of persons summoned.

The policy of the law of bankruptcy adopts the principle of the

local administration of the estates of bankrupts by means of district Courts, and this policy is recognised in the latest Act on the subject, the *Bankruptcy Amendment Act*, 1868, s. 8, which came into operation after the bill in this case was filed, but which is incorporated with the *Bankruptcy Act*, 1861. The practice of this Court has been uniform in refusing to interfere with the jurisdiction of the Court of Bankruptcy. Thus, in the case of *Wearing* v. *Ellis* (1), Lord *Cranworth*, in deciding that a bill in Equity in respect of the surplus real property of an insolvent could, under the circumstances, be sustained, guards himself in coming to that conclusion by saying: "I certainly should not have done so had I not been perfectly satisfied that I do not in the slightest degree intrench upon the doctrine of any of the cases laying down this proposition, which ought to be the pole-star to guide us in questions of this sort, namely, that this Court has nothing whatever to do with respect to the distribution of the property of a bankrupt or insolvent, the jurisdiction in which matters has by the Legislature been transferred to the Court of Bankruptcy or the Insolvent Debtors' Court."

Again in the case of *Dyson* v. *Hornby*, Lord Justice *Turner* says (2): "The Legislature has created the Insolvent Debtors' Court for the purpose of administering the estates of insolvents, has provided for the vesting of their estates in their assignees, for the payment of their debts, and for the revesting in them, or those claiming under them, of the surplus, if any, of their property through the medium of that Court; and I scarcely know anything which, in my judgment, would be more mischievous than for this Court to interfere with the jurisdiction thus created by the Legislature. If this Court were to interfere as to the surplus it could hardly stop short of ascertaining whether there was a surplus or not, and then there would follow an examination of all the property of the insolvent, and an inquiry as to each of his debts, without the powers which the Legislature has given to the Insolvent Court for the purpose of such examination and inquiry."

The principles thus enunciated are, we think, applicable to the case of trust deeds under the Act of 1861. The trustees of such deeds are, as we have seen, placed in the position of creditors' as-

(1) 6 D. M. & G. 606. (2) 7 D. M. & G. 7.

L. JJ. 1869 MARTIN v. POWNING.

signees, their office is to secure the due payment of the composition agreed upon, or the proper distribution of the debtor's estate, according to the law and practice of Bankruptcy, being, in fact, substituted for the ordinary machinery of the Court of Bankruptcy, and they are made by the Act directly amenable to the jurisdiction of that Court.

There may be cases (of which *Riches* v. *Owen* (1) is an example) in which it may be right for this Court to exercise its jurisdiction notwithstanding the registration of a trust deed under the Act of 1861, but we think it was not intended by the Legislature that this Court should, under ordinary circumstances, entertain a suit for the administration of the trusts of such a deed, and that it would be contrary to the principles and practice of this Court to do so. The Court would otherwise be involved in the very difficulties which have been pointed out by Lord *Cranworth* and by Lord Justice *Turner*, and would be undertaking the administration and distribution of the debtor's estate without those extensive powers to which we have already alluded, and which have been given to the Court of Bankruptcy for the purpose, but which the Court of Chancery does not possess.

In his judgment in the present case the Vice-Chancellor *Stuart*, in referring to the decision in *Bell* v. *Bird* (2), says: "Where no relief was sought by the bill except what was incident to the simple administration of the property, no difficulties stated by the bill, and nothing asked of this Court but a simple performance of that duty which can well be performed by the Court of Bankruptcy, the Court, finding nothing specially alleged by the bill to induce it to exercise that jurisdiction which might easily be exercised by the Court of Bankruptcy, refused to entertain jurisdiction, and allowed a demurrer to the bill;" and the Vice-Chancellor proceeds to say that "Lord *Cottenham*, in a case of concurrent jurisdiction which arose before him (*North Eastern Railway Company* v. *Martin* (3)), stated the principles on which this Court ought to act where there is a concurrence of jurisdiction. In that case there was an action at law to recover the balance of an account. There was a bill filed in this Court to have the account taken. The case

(1) Law Rep. 3 Ch. 820. (2) Law Rep. 6 Eq. 635.
(3) 2 Ph. 758.

was one in which there was a concurrence of jurisdiction, and Lord *Cottenham* stated that where there is a concurrence of jurisdiction, and this Court has to decide which of the two jurisdictions is to prevail, the convenience of the parties, and the circumstances of the case, must indicate what the course of the Court should be."

We conclude from these passages in his judgment that the Vice-Chancellor was of opinion that under ordinary circumstances this Court ought not to entertain a suit for the administration of the trusts of a deed registered under the Act of 1861, and in that opinion we entirely concur.

It remains for us to consider the second question, viz., whether the circumstances of this case or the provisions of this deed are such as to take the case out of what we have held to be the ordinary rule of the Court, and such as to induce the Court to entertain this suit. The circumstances relied on for this purpose by the Plaintiff are, that the Defendants *Barker* and *Bramall* supplied the trust estate with large quantities of goods while the debtor's business was being carried on under the Defendants' superintendence, and that, with the privity and consent of the Defendant *Powning*, they paid themselves large sums out of the trust moneys in their hands for the goods so supplied, and thereby made large profits which they were not entitled to make, and that the payments made on account of the first and second instalments of the composition in exoneration of the personal liability of the Defendants *Barker* and *Bramall* were improper, and the bill seeks to have those payments, as well as the profits made by the Defendants, disallowed in taking their accounts. But it is clearly competent to the Court of Bankruptcy to deal with such transactions, and to give the necessary relief either in the case of assignees in an ordinary bankruptcy, or in the case of trustees under a trust deed, and that Court would, of course, disallow any items or sums of money proved to be improperly included in the discharge of the trustees; and the special powers to which we have already referred, and particularly those of summoning and examining all persons whomsoever, are peculiarly adapted to the investigation of such circumstances, and to the discovery and correction of any neglect or misfeasance on the part of persons in the position of these Defendants; and as the bill merely prays that the trusts of the

L. JJ. 1869 MARTIN v. OWNING.

deed may be administered, and that an account may be taken of the moneys and property received by the Defendants, and of their disposal thereof, and that in taking such account the Defendants may be disallowed the payments and profits to which we have alluded, we think that there are no such special or extraordinary circumstances in this case as to take it out of what we conceive to be the ordinary rule of the Court, and, consequently, that the second question must be answered in the negative.

The order of the Vice-Chancellor must therefore be discharged, and the usual order made allowing the pleas with costs.

There will be no costs of the appeals, and the deposits will be returned.

Solicitors: Messrs. *Johnson & Weatheralls;* Messrs. *Ashurst, Morris, & Co.;* Messrs. *Doyle & Edwards.*

L. JJ. 1869 *March* 18.

WEBSTER *v.* MANBY.

Practice—Costs of Motions—Application to review Taxation—Ord. of 17th April, 1867.

An application to review taxation must be made by a summons in Chambers, and cannot be made on motion.

The usual rules as to the costs of motions do not always apply; and where one of the parties is ordered to pay all the costs of a suit up to a given time, the costs of motions made during that time may be included in the costs of the suit.

Order of *James*, V.C., affirmed.

BENJAMIN WEBSTER, the Plaintiff in this case, had mortgaged certain property to the Defendant, *Charles Manby*, for £3500. In 1865, *Manby* brought an action against *Webster* for £3762 principal and interest due on the mortgage; and *Webster*, in February, 1865, filed the original bill in this suit, alleging that he had made large payments to one *Robinson* as agent for *Manby*, and asking a reconveyance on payment of the balance, and that the action might be restrained. *Webster* then obtained an injunction to restrain the action until the answer came in. The Defendant *Manby* filed his answer denying the agency of *Robinson*, and then moved to dissolve

the injunction, which was dissolved accordingly. *Webster* then pleaded to the action, and paid £3108 into the Court of Law. *Manby* took this sum out of Court, and replied in the action that the sum was not sufficient. The action was proceeded with, and at the trial a verdict was given for *Webster*, the Plaintiff in Equity, who was considered to have established the agency of *Robinson*. *Webster* then amended his bill, stating these facts, and the suit came to a hearing; accounts were directed, and *Webster* was found to have paid into Court £60 too much.

The suit then came on to be heard on further consideration before the Vice-Chancellor *Giffard*, who on the 7th of July, 1868, made an order for reconveyance by *Manby*, and payment by him of the £60; *Webster* to pay the costs of the suit up to the time of the payment into Court; no costs from that time up to the first hearing; *Manby* to pay the subsequent costs.

On taxation the Master allowed to *Manby*, as part of the costs of suit payable by *Webster*, costs of the motion for the injunction, and *Manby's* costs of the motion to dissolve.

Webster moved before the Vice-Chancellor *James* for a declaration that these costs ought not to have been allowed, and that the matter might be referred back to the Master.

The Vice-Chancellor *James* was of opinion that the Taxing Master was right, and refused the motion with costs. *Webster* now renewed the motion before the Lords Justices by way of appeal.

Mr. *Pearson*, Q.C., and Mr. *Currey*, for the Defendant, took a preliminary objection, that by the Order of the 17th of April, 1867, rule 3, all such applications must be made by summons in Chambers, and that the original motion before the Vice-Chancellor was therefore wrong.

Mr. *Druce*, Q.C., and Mr. *Townsend*, for the Plaintiff:—

At all events, we are not wrong now, as we are appealing by motion against an order made on motion. If the objection is good, then we appeal against the order of the Vice-Chancellor, who ought not to have heard the motion upon the merits.

As to the merits, the costs in these motions ought to be

L. JJ. 1869 WEBSTER v. MANBY.

governed by the regular rules as to costs of motions: *Daniell's* Chancery Practice (1). If success is to be the test, then we claim the costs, at all events, of the first motion. It is true that the Defendant succeeded on the motion to dissolve, but then it was upon his answer, the case made out by which was afterwards decided to have failed, and therefore the injunction was right. If the Defendant has the costs of his motion to dissolve as costs in the cause, we ought to have the costs of ours, as we succeeded in ours: *Stevens* v. *Keating* (2), on which the Taxing Master relied, was a patent case, which is peculiar as to costs.

SIR C. J. SELWYN, L.J.:—

Our opinion coincides with that of the Taxing Master and of the learned Vice-Chancellor. The case of *Stevens* v. *Keating* may not be precisely in point, but is an authority to shew that the rules laid down by Sir *J. Leach* are subject to exception in some cases, and the question is, whether this is one of them. The suit asked to have the action restrained, and for discovery; an injunction was obtained and afterwards dissolved. Now, assuming for the sake of argument that the Plaintiff had been in the wrong throughout, then could it be said that he ought not to be ordered to pay the costs of these two motions, and would not this constitute an exception to the rules? The question is, whether in this case, where the Plaintiff has not been in the wrong throughout, but has to pay costs up to a certain day, a different rule ought to prevail. These two motions were made during the period as to which the Plaintiff has to pay the costs, and if he was not then exactly in the wrong he must be considered in the same position as if he had been in the wrong. I think that the Vice-Chancellor was quite right in his decision.

As to the preliminary objection, I will express my opinion, though we do not decide the case upon it. The Order says that such applications shall be made by summons, and it is argued that this Order has been disregarded by the present Appellant, who made his application to the Vice-Chancellor in Court. It is true that this is a motion to discharge an order made on a motion, but I cannot agree with Mr. *Druce* in his contention that where a person has

(1) Page 1261. (2) 1 Mac. & G. 659.

two grounds of opposition, and relying on both has obtained an order upon one, he must be considered to have acquiesced in disregarding the other; and if it was necessary to decide upon the preliminary objection I should have decided against the Appellant.

SIR G. M. GIFFARD, L.J.:—

I am of the same opinion. *Stevens* v. *Keating* (1) shews that the general rules are subject to exceptions, and the only question is, whether this particular case forms an exception. The suit was a suit for redemption, and the motion was for an injunction to restrain the Defendant from proceeding at Law. The Defendant was restrained until answer. The answer was put in, and the injunction was dissolved. The action went on, and a verdict was given for the Plaintiff in Equity. The suit was then proceeded with, and the Plaintiff was ordered to pay the costs of the suit up to a certain day beyond that on which the injunction was dissolved; therefore the usual rules as to the costs of motions do not apply, and the Taxing Master was right.

As to the preliminary objection, there seems no doubt that the question ought to have been discussed upon summons in Chambers. This appeal motion must be dismissed with costs.

Solicitors for the Plaintiff: Mr. *W. S. Webster.*

Solicitors for the Defendant: Messrs. *Sharp & Ullithorne.*

(1) 1 Mac. & G. 659.

L. C.

1869

Jan. 13, 15, 16, 18; *Feb.* 11.

TURQUAND *v.* MARSHALL.

Company—Liability of Directors—Misrepresentations—Repayment of Dividends—Losses.

Though directors by misrepresenting the state of a company cause larger dividends to be paid than ought to have been paid, the shareholders as a body cannot make the directors liable to repay those dividends.

The deed of settlement of a banking company provided, that when one-fourth of the capital was lost, the directors should call a meeting, and the company should be dissolved. Considerably more than one-fourth of the capital was lost, and a meeting was called, at which the shareholders resolved to continue the bank. Further losses were made, but no such meeting was called again:—

Held, that as the shareholders knew that the bank was going on after more than one-fourth of the capital was lost, the directors were not liable for continuing the bank.

The directors of a banking company are not liable to the company for including in their accounts as good, debts which were, in fact, bad, unless they can be fixed with knowledge of the fact.

Where the directors had misrepresented the state of the company, each shareholder might have his remedy against them at law; but the whole body of shareholders could not maintain a suit in equity to recover the money which they had lost from the directors.

A bill seeking to make the directors liable for misrepresenting the value of the assets of a company, alleged that they had included amongst the assets as good a sum advanced by them to a director who had died insolvent and without having repaid the sum; and the bill prayed that the Defendants might be declared liable for allowing directors and others to overdraw their accounts:—

Held, that on such a bill, the directors could not be made liable for the sum so advanced and lost, on the ground that it had been improperly advanced.

Decree of the Master of the Rolls reversed.

THIS was a suit by *William Turquand*, the official liquidator of the *Herefordshire Banking Company*, suing on behalf of the company, but indemnified by Mr. *Skey*, a large shareholder, and it sought to render the directors of the company liable for losses incurred by the company.

The company was established in 1836, with a deed of settlement providing, by the 108th clause, that the company should stop when one-fourth of the capital was lost, and providing for the mode in which advances were to be made to directors; and by the 27th clause the company was, in certain cases, compelled to purchase

the shares of deceased or insolvent shareholders. The material clauses are set out at length in the report of the case before the Master of the Rolls (1). In 1840 it was discovered that a large portion of the capital had been lost, and a full investigation then took place. It appeared then that more than one-fourth of the capital of the company had been lost, even taking credit for £6000 preliminary expenses; and at a meeting held on the 3rd of June, 1840, a resolution was proposed that the bank should discontinue business, which was negatived, and a resolution was passed that it should be continued. On the 2nd of February, 1842, another meeting was held, and it was resolved that £2 10*s.* per share should be called up, making £12 10*s.*; but that the capital should be treated as reduced one fifth, and each share credited with £10 only, and that the bank should continue on that footing. The bank carried on business, publishing annual reports which shewed a profit, and declaring a dividend each year until 1863, when it was ordered to be wound up. The assets realized in the winding-up were £55,285, the liabilities £92,497, leaving a deficiency of £37,212, besides the costs of the winding-up.

The bill was filed against all the directors who were living, and against the representatives of *William Crowther*, who was elected a director in 1846, and had died since the winding-up, and against the representatives of *E. Smeeton*, who was elected a director in 1855, and had died since the winding-up. The bill did not make any complaints as to the dealings before 1846, but alleged that the directors had in each year since that time presented false balance sheets, which represented the assets larger than they were, principally by including amongst them the amounts paid for shares in the company which had been bought from time to time by the directors on behalf of the company, and dividends on such shares; and by including overdue bills and bad debts; it also complained that the directors had, at the annual meetings, stated that the bad debts had been written off, and that there was a surplus fund in hand. The bill also complained that *William Higgins*, who had for some time been a director, was permitted by the other directors of the bank to become indebted to the bank in a sum of £8134; that *Higgins* had died insolvent in 1860, but the said sum of

(1) Law Rep. 6 Eq. 112.

L. C. 1869

TURQUAND v. MARSHALL.

£8134 was included in the balance sheet presented to the shareholders at every subsequent meeting at its full amount as a good debt. The bill also complained that, in July, 1847, when the balance sheet for 1846 was submitted to the shareholders, the whole surplus fund and more than one-fourth of the capital had been lost, that its loss was known to the then directors, that the loss increased, and insisted that the Defendants were liable for the whole deficiency of £37,212 occasioned by their breach of trust in neglecting to dissolve the company under the 108th clause of the deed of settlement; it further insisted that the directors had in each year improperly paid dividends to the shareholders, and that the estates of the directors were liable to repay the amounts so paid; and the bill prayed an inquiry as to the damages caused to the company by carrying on the business after it ought to have been wound up; also an account of the dividends distributed; that the damages caused to the company and the shareholders by allowing directors and others to overdraw their accounts, and by allowing bad debts to remain so long outstanding as to become irrecoverable, and by the publication of false reports, and all other breaches of trust by the Defendants, might be assessed, and that the Defendants might be declared liable to pay what might be found the total amount of such dividends and damages.

The Defendants generally denied that they had any personal knowledge of the matters in question, and much evidence was gone into on that matter, and on the nature and extent of the different bad debts. The allegations in the bill as to the amount and dates of the losses were sufficiently proved, and also the fact of the publication of the balance sheets, and that the directors at the meetings, in answer to questions by *Skey* and others, had stated that the bank was prosperous. The Defendants also entered into evidence to shew that the shareholders were aware of many of the matters now complained of; the effect of which is stated in the judgment of the Lord Chancellor.

The Master of the Rolls made a decree that the Defendants were liable to make good the losses occasioned by their not having summoned a special meeting, when, subsequently to 1846, the losses of the company had exhausted the surplus and one-fourth of the capital, and also by reason of the advances made to *Higgins;* and

a reference was directed as to what losses had been sustained by the shareholders by each of such transactions (1).

The representatives of *Crowther* and the representatives of *Smeeton* appealed separately.

Mr. *Druce*, Q.C., and Mr. *W. W. Cooper*, for the representatives of *Crowther* :—

We contend—1. That the official liquidator is not the proper Plaintiff. 2. That this is a bill for damages. 3. That being for damages, no such suit or action can be maintained against an executor. 4. That it is clear that one-fourth of the capital was lost in 1842 before *Crowther* became a director. 5. As to the loan to *Higgins*, no case is made by the bill; and, moreover, it was not an irregular loan, and was within the powers of the directors.

As to the first point, all the debts have been paid, and the official liquidator can no longer sue as representing the creditors: *Harrison* v. *Brown* (2); *In re Bank of Gibraltar and Malta* (3). This is an unregistered company, and comes under sect. 203 of the *Companies Act*. An official liquidator may sue for a call, or for anything else necessary to get in the assets, but not on a ground like this. He does not for such a purpose represent the shareholders; and any other shareholder might institute his own suit on the same grounds: *Ernest* v. *Weiss* (4).

Secondly: This is a claim for damages for improper conduct, and the directors may be liable at law, but not as trustees. Of course a director is liable in this Court to account for all the money which has come to his hands, but not for misconduct as an agent: *Bovey* v. *Tracey* (5); *Corporation of Ludlow* v. *Greenhouse* (6). *Charitable Corporation* v. *Sutton* (7) is an exceptional case, and has not been followed except in *Attorney-General* v. *Wilson* (8).

Thirdly: This is a proceeding in the nature of an action for damages on a tort, and the rule of law must be followed that *actio personalis moritur cum personâ*. If money came to the hands of our testator, we should be accountable, but not for damages on the ground of his misconduct.

(1) Law Rep. 6 Eq. 112.
(2) 5 De G. & Sm. 728.
(3) Law Rep. 1 Ch. 69.
(4) 2 Dr. & Sm. 561.
(5) 2 Eq. Cas. Ab. 163.
(6) 1 Bli. (N. S.) 17.
(7) 2 Atk. 400.
(8) Cr. & P. 1, 28.

L. C. 1869 TURQUAND v. MARSHALL.

Fourthly: The shareholders in 1842 knew that one-fourth of the capital was lost, and yet determined to go on; they had therefore dispensed with the condition of clause 108 of the deed, and the directors were not bound to go on calling a meeting whenever further capital was lost. Every shareholder who has received dividends must be taken to have acquiesced in the proceedings of 1842.

Fifthly: There was a loss, but no fraud, in the loan to *Higgins*; and there is no allegation in the bill that the loan to him was improper.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the executors of *Smeeton*:—

This is not a case in which the company or the official liquidator can sue. Each partner may have a ground of complaint and a right to damages, but each has a separate and independent case, and a different right to damages. How can we be liable to account to the existing partners for wrongs done to former partners? No director can be liable for the misdeeds of former directors; and in that respect, at all events, the decree cannot be supported. If any shareholder alleges that he has been induced by the false balance sheet to buy shares, he may proceed at law, and make out his own case. The directors are not asked to refund money, but to pay damages. It is true that, as between partners, the Court will entertain such a suit; but then it must give them in accordance with the rules of law, and no damages can be given against executors.

This is a suit on behalf of the company, that is, of the shareholders; but *Smeeton* was a shareholder, and how could he sue himself for damages occasioned by his own misconduct. There is no corporation in this case, and the *Companies Act* does not give the official liquidator power to maintain such a suit.

Sir *Roundell Palmer*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Swanston*, Q.C., for the Plaintiff:—

The official liquidator is the proper person to sue under sects. 95, 103, 104, 165 of the *Companies Act*. Suing by the Public Officer would be improper after the winding-up is commenced. *Harrison* v. *Brown* (1) was a case where the company was not liable to be

(1) 5 De G. & Sm. 728.

wound up at all. As this is not a corporation, there is no one but the official liquidator who can sue. *Turquand* v. *Kirby* (1) is directly in point. No shareholder could proceed unless the official liquidator refused.

It is said this is a bill for damages. The bill is not bad merely because the word "damages" is used instead of loss. It is a bill for loss arising from malfeasance and breach of trust and duty. The title to relief flows out of the relation of the directors to the shareholders: *Charitable Corporation* v. *Sutton* (2). This case has never been called in question; and in *Attorney-General* v. *Wilson* (3) Lord *Cottenham* relied on it. *York and North Midland Railway Company* v. *Hudson* (4) is also in point. It was a breach of duty by the directors to contract debts, and make their *cestuis que trust* liable.

Western Bank of Scotland v. *Bairds* (5) is exactly in point as to not dissolving the company when one-fourth of the capital was lost. The last stage of that case raised the next point, whether it was a suit for damages; and it was decided not to be so, but a breach of duty by persons in a fiduciary character: *Western Bank of Scotland* v. *Baird's Trustees* (6). We cannot get relief at law, and have a right to come to equity: *Clifford* v. *Brooke* (7). It is admitted that in partnership cases there is relief in equity for misrepresentation, because there is no adequate relief at law; and that is just our case. Again, there is a combination of several, against some of whom we have no remedy at law: *Barry* v. *Croskey* (8).

It is said that the shareholders have had the dividends and cannot be paid twice, but here the directors ask to be allowed these sums in their accounts. There is no case where a trustee who has behaved fraudulently has been allowed to get back what he has paid away: *Davidson* v. *Tulloch* (9).

The doctrine that *actio personalis moritur cum personâ* does not apply in equity, or where there has been a breach of trust. *David-*

(1) Law Rep. 4 Eq. 123.
(2) 2 Atk. 400.
(3) Cr. & P. 1.
(4) 16 Beav. 485.
(5) 24 Dec. in the Court of Session (2nd Series) 859.
(6) 4 Dec. in the Court of Session (3rd Series), 1071.
(7) 13 Ves. 131.
(8) 2 J. & H. 1.
(9) 3 Macq. 783.

L. C. 1869

TURQUAND v. MARSHALL.

son v. *Tulloch* (1) was not a case where there was a fiduciary relation: *Walsham* v. *Stainton* (2).

Mr. *Druce*, in reply, for *Crowther's* executors.

Mr. *Everitt*, in reply, for *Smeeton's* executors.

Feb. 11. LORD HATHERLEY, L.C., said that this was, to a great extent, a new case, the only case at all like it being *Western Bank of Scotland* v. *Bairds* (3). Two things were to be considered, first, whether the decree appealed from could be supported, and then whether any other decree could be made upon this bill adequate to the exigencies of the case. His Lordship was not much impressed with the technical difficulty that this bank was not a registered company, or that the suit was instituted by the official liquidator on behalf of the company, but there were real and substantial difficulties in the case.

It was by no means easy to ascertain the exact grounds upon which relief was asked in this bill, whether it was fraud or neglect, or because the capital had been paid away in dividends, or whether the bill sought to have the funds replaced which had been lost by the business being carried on, or to have compensation for the loss incurred by persons who had been induced by misrepresentation to become shareholders.

The bill alleged that the shareholders ought to have been called together when a further one-fourth of the capital had been lost, and that instead of doing this the loss had been concealed, and the bank had gone on. The bill also alleged that the directors ought to be made liable for all money paid away improperly in dividends. This last was a very singular claim, as, in fact, it was asking the directors to pay over again to the shareholders what they had already received as dividends.

It also alleged that bad debts had been incurred by the default of the directors, and one special case was mentioned of a loss incurred by an irregular advance to one of the directors, and

(1) 3 Macq. 783. (2) 1 D. J. & S. 678.
(3) 24 Dec. in the Court of Session (2nd Series), 859.

as to this, if properly alleged and proved, a bill might be maintained, though probably the relief sought could be obtained in the winding-up by causing the sums so lost to be disallowed to the directors.

It was difficult to ascertain whether fraud had not been relied upon at the Bar before the Master of the Rolls, yet there certainly were no distinct allegations of fraud in the bill, and the Master of the Rolls seemed to have considered that the bill was not founded on fraud, the reasons for his decree being the non-stoppage of the bank and the advance to *Higgins*.

His Lordship quite concurred with the Master of the Rolls in rejecting the claim by a shareholder who had received dividends to recover them again from the directors as having been improperly paid. So far as regards the non-stoppage of the bank, the Master of the Rolls considered it immaterial when the breach of duty occurred, though some of the directors did not become directors until after this alleged breach of duty had occurred. The declaration made in the decree did not exactly follow the words of sect. 108 of the deed, but made an abstract declaration of liability; an inquiry could, however, be directed as to the time when the loss came to the knowledge of each director, if the directors were held to be liable.

His Lordship agreed with the Master of the Rolls in thinking that if there was nothing special in the case beyond the loss and the reduction of capital in 1842, the new business would be carried on under the same rules as before, and the directors might still be under an obligation to call a meeting of shareholders whenever one-fourth of the existing capital was lost. But, besides the reduction of capital, it appeared that when the meeting of 1842 took place, and the capital was reduced, it was known to the directors, and must have been plain to the shareholders, that very much more than one-fourth of the capital was gone. One of the items treated as an asset was about £6000 charged for preliminary expenses, but this clearly could not be considered an asset, and if this was deducted, then much more than one-fourth of the nominal capital after the reduction was gone, and the shareholders must have been aware of the fact. If, therefore, they chose to go on, they could not expect the directors immediately to call another

L. C. 1869

TURQUAND v. MARSHALL.

meeting and stop the bank. Again, in 1840 there was an inquiry into the management, the accounts were investigated, and the committee of inquiry came to the conclusion that there had been great losses, and at the meeting in February, 1842, attention was drawn to the expenditure for preliminary expenses, which was then represented as £9472, and yet a dividend was declared, though the directors and the shareholders must have known that that item for preliminary expenses was a loss, and that if the company was then wound up, after the losses which had been suffered, it would be insolvent. If preliminary expenses were incurred in the purchase of anything like the stock of a brewery, then they could be treated as an asset, but if merely paid for goodwill credit could not be taken for that sum, as the benefit of the goodwill appeared annually in the form of profit in the profit and loss account. This item for preliminary expenses was reduced in subsequent years, but still, if the shareholders and directors chose to go on with the bank in this condition, the directors who came in afterwards could not be held liable because they did not call a meeting and stop the business.

There remained, however, two other heads of complaint: certain dealings in shares which were alleged to be illegal, and the amount of over-due bills which were still treated as assets. As to the illegal dealings in respect of the purchase of shares, it was said that the directors had no right to purchase shares in the company for the company; but it was clear that, according to the provisions of the deed, this could be done, whether it was prudent or not. Moreover, in 1841, there was an express mention of a large sum having been spent in the purchase of shares, and even if these purchases were not mentioned in the subsequent balance sheets, the shareholders must have been aware of what the directors were doing, and made no objection. Besides, the register of shareholders was always open, and from that the shareholders might have seen that these and many other shares had been purchased by the company.

As to the overdue bills, it was not easy to fix the directors with liability as for wilful default in not ascertaining and stating what bills or debts were past recovery. In such cases there were many shades of loss, and though in some cases it might be considered

that there was no doubt, the directors could not be held fixed with that knowledge, and held personally liable for not stating what debts were hopeless.

There were many other difficulties in the way of any relief. Many of these things were done before the Appellants became directors, and it was difficult to fix a director with liability because he did not undertake proceedings against his co-directors to have the capital replaced, even if that were the right course to take. Such a director came in and found a state of things which had existed for some time, with the assent of all parties, and it could hardly be said that he was in the position of a trustee who, finding the trust fund lost, did not take steps to recover it. There would have been great difficulty even upon that view of the question; but the cases of the *Western Bank of Scotland* (1), might have been held applicable if it had not been clear that the directors in this case were really absolved by the conduct of the shareholders from the duty which might have been imposed upon them.

It was true that £37,000 beyond the capital had been lost, but it was by no means certain that in any case that sum could be recovered by a proceeding like this. A trustee might be liable for detriment to an estate in his possession, or for neglecting to recover an asset for which he was once responsible, but there was no instance of a trustee being made responsible in the manner contended for. If any shareholder had been deceived, and induced to remain longer in the concern, and had thereby incurred loss, such a loss might perhaps have been recovered by him in an action at law, though the Lord Justice Clerk seemed to have had some doubt, and to have considered the damage very remote. But in that case, it was clear that each shareholder must recover for himself the loss which he might have incurred by having purchased his shares under misrepresentation. Each would have to bring his own action for his own damage, but the whole body of shareholders could not call upon the directors to pay at once to the capital of the concern the whole amount which had been lost.

This was a substantial and not a technical difficulty in the way of such a bill on behalf of all the shareholders, independently of the fact that all the shareholders knew what had been done. If

(1) 24 Dec. in the Court of Session (2nd Series) 859; 4 Ibid. (3rd Series), 1071.

L. C. 1869 TURQUAND v. MARSHALL.

a bill like this had been filed in 1844, the then directors could not have been made responsible, and the present shareholders must be taken to know all that the previous shareholders knew. There was no fraud alleged, nor was it alleged that the directors applied the funds of the company to their own use, or in any way except in what they thought was for the benefit of the company, however incorrect their course might have been.

8 Ch 1045

Then as to the loan to *Higgins*. The statement of this in the bill was only as part of the general misconduct of the directors, and the loan was only mentioned as one of the losses incurred. There was no specific allegation of any impropriety in lending the money to him, nor was any specific relief prayed in this respect. It was within the powers of the deed to lend to a brother director, and however foolish the loan might have been, so long as it was within the powers of the directors, the Court could not interfere and make them liable. They were intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors; but as long as they kept within the powers of their deed, the Court could not interfere with the discretion exercised by them. If a bill had been filed to stop their lending money in this way, the Court, on the principle of the case of *Foss* v. *Harbottle* (1), could not have interfered upon that ground.

There was no allegation in the bill that the formalities prescribed by the deed for such loan had not been complied with, and if it was not proved that they were complied with, the Court could not deal with the claim on such a bill as this, or allow any relief to be given upon such a slight foundation. If the directors did wrong, that must be dealt with in the winding-up, and if they were wrong in lending to *Higgins*, the sum lent would not be allowed to them in their discharge.

(1) 2 Hare, 461.

The bill had wholly failed to shew any case for relief, and no relief could be given upon it.

Then as to the costs of this suit. This was not in fact a suit by the whole body of shareholders, but by Mr. *Skey* alone, who indemnified the official liquidator. But Mr. *Skey* had much to complain of; he attended meetings, and asked questions which ought not to have been answered as they were by the directors without more careful inquiry. No doubt great errors were committed by some of these gentlemen, two of whom were now dead, but the winding-up was in 1863, and this bill was not filed until 1865, when they were not there to explain. Still they seemed to have been actively engaged in some of these transactions, the purchase of the shares, and the including bad debts amongst the assets, and to have assented in the answers given to Mr. *Skey*. Each shareholder might have his remedy at law; but in order to mark the disapprobation of the Court, the bill must be dismissed without costs, and there would be no costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Bower & Cotton.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland;* Mr. *Peacopp.*

L. JJ.
1869
Feb. 17, 18, 19.

INCHBALD *v.* ROBINSON.
INCHBALD *v* BARRINGTON.

Nuisance—Injunction—Noise—Crowds—Statute 25 & 26 *Vict. c.* 42 (*Sir J. Rolt's Act*).

5 Ch 462.
11 Eq 346-7
8 Ch 468

A circus, the performances in which were to be carried on for eight weeks, was erected near the Plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten. It was proved that the noise of the music and shouting in the circus could be distinctly heard all over the Plaintiff's house, and was so loud that it could be heard above the conversation in the dining-room though the windows and shutters were closed, and several persons were talking in the room.

Held (affirming the decision of *Malins*, V.C.), that this was such a nuisance as the Court would restrain by injunction.

If the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury.

THESE causes came before the Court on appeal by the Defendant *Barrington* from decrees of Vice-Chancellor *Malins*.

The Plaintiff was, and for some years had been, the occupier as tenant from year to year of a house in *Park Terrace*, at *Croydon*. On the 21st of August, 1867, the Defendant *Barrington* commenced the erection of a circus on a vacant piece of ground belonging to the Defendant *Robinson*, at a distance of about eighty-five yards from the rear of the Plaintiff's house. The Plaintiff, on the 29th of August, 1867, filed his bill on behalf of himself and the other occupiers of houses in *Park Terrace* against *Robinson* and *Barrington*, stating the commencement of the erection of the circus, and that *Barrington* threatened and intended to open it for day and evening equestrian performances, and to continue the same for a considerable period; and that the erection of the circus and the contemplated equestrian performances would, if permitted, necessarily draw together large numbers of disorderly persons, and become a great nuisance to the inhabitants of the houses in *Park Terrace*, and greatly depreciate their value for residential purposes, and that there was little doubt but that the immoral proceedings which had attended a circus set up by another person in the pre-

ceding year on the same piece of ground would be renewed; and the bill prayed for an injunction.

On the 5th of September, 1867, Vice-Chancellor *Malins*, after hearing counsel on both sides, granted an injunction. *Barrington* thereupon discontinued the erection of his circus, and entered into an agreement with *J. B. Jayne* for liberty to erect the circus on a field, called the *Fair Field*, situate in front of *Park Terrace*, on which field a fair was annually held. The Plaintiff at once gave *Barrington* and his solicitors notice that if he erected his circus there the Plaintiff would take proceedings against him. About the 13th of September, however, *Barrington* commenced erecting the circus at a distance of about 115 yards from the Plaintiff's house, and on the 18th of September the performances commenced. There was a performance every evening from half-past seven o'clock till about half-past ten or eleven, and occasionally an additional performance in the morning.

On the 23rd of September the Plaintiff filed his bill against *Barrington* and *Jayne* for an injunction, stating the above circumstances, and that on the 18th of September the performance commenced at half-past seven in the evening, and lasted till between half-past ten and eleven; that a great number of persons attended the performance; that throughout the performance there was music, including a trombone and other wind instruments and a violoncello, and great noise, with shouting and cracking of whips; that the noise occasioned very great disturbance to the Plaintiff and his family, and to other occupiers of houses in *Park Terrace;* and that the performance attracted vendors of walnuts and other noisy persons in great numbers, who loitered about *Park Lane* opposite the terrace to the annoyance and disturbance of the Plaintiff and his family, and the inhabitants of houses in the immediate neighbourhood. The bill further alleged similar performances on the two following days, causing similar annoyance and disturbance, and charged that the music and other noises accompanying the performances were an intolerable nuisance to the Plaintiff and his family, and that the assemblage of disorderly persons caused by the performances was also an intolerable nuisance to them, and that if the performances were continued the value of the Plaintiff's house as a residence would be materially depreciated.

L. JJ.
1869
INCHBALD
v.
ROBINSON.
INCHBALD
v.
BARRINGTON.

It appeared subsequently, from *Barrington's* affidavit, that the ground had been let to him for six weeks from the 12th of September, but there was evidence that the performances were intended to be continued for two months.

On the 26th of September, 1867, Vice-Chancellor *Malins* granted an injunction which, by consent, was suspended till after the 3rd of October, when, in obedience to it, the performances were stopped, and the circus removed.

Barrington appealed from this order, and on the 7th of November, 1867, the appeal motion came on before the Lord Justice Lord *Cairns*. The Plaintiff had not filed affidavits in reply to those filed by *Barrington*, in one of which *Barrington* deposed that he had, on the 24th of September, been in No. 3, *Park Terrace*, at a time when the performance was at its height, and that no sound could be heard from it in the house. His Lordship dissolved the injunction, saying that he was far from satisfied upon the evidence then before the Court that any case of nuisance, as that term was understood at law, could be maintained by the Plaintiff. There were, no doubt, many authorities to the effect that noise in the immediate proximity of a residence might become a nuisance, and might be abated as such; there were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act. His Lordship, however, said that the evidence, which might be very different at the hearing, failed entirely to satisfy him, as it then stood, that the noise of the performance was such as would occasion a nuisance to a house so far off as that of the Plaintiff, or that there was any collection of crowds to such an extent as to block up the thoroughfare or occasion a nuisance to the Plaintiff. His Lordship thought that although the injunction was now of no practical effect, it ought to be dissolved, as the Defendant would otherwise be prejudiced at the hearing.

On the 15th of December, 1868, Vice-Chancellor *Malins* in each suit made a decree for a perpetual injunction, with costs against *Barrington*, who now appealed from both decrees. The

(1) See 34 L. R. 308: 1711 R. 272.

ground originally let by *Robinson* to *Barrington* had since been covered with buildings.

The evidence as to the noise was to the following effect:—

The Plaintiff, by affidavit, stated as follows:—"Being extremely surprised at the Defendant *Barrington* having stated in his affidavit that the music could not be heard inside the houses in *Park Terrace*, I made particular note of what I could hear, and I say that, sitting in my drawing-room, I could most distinctly hear the music and band in the circus, and distinguish the tunes, with ringing of a bell, cracking of the whips, the shouting to the horses performing, loud roars of laughter, with clapping of hands, stamping of feet, and other applause. I could also hear the talking of the clown, and could even distinguish occasionally the words used, and so distinctly could I hear sounds from the circus that I could even distinguish a single person clapping his hands. I could also, while in my dining-room, with the window closed and fastened, the shutters being also closed and fastened, hear the music very distinctly, and could distinguish the tune of the 'Cure'; could hear also at other times a most unpleasant noise from an instrument which I took to be either a trombone or a bass viol. I could hear also the applause so as entirely to destroy the ordinary peace and quiet of my dwelling house. In fact, I am satisfied that in no room in my house could I entirely escape from the noises arising from the circus.

The Rev. *J. F. Franks* stated:—"During most of the time that such performances were being carried on there was music both of wind and stringed instruments, which was distinctly heard in my house, No. 8, *Park Terrace*, even with the windows and shutters shut, and from my door I could hear distinctly the voice of the clown, cracking of the whips, and the applause of the people inside the circus. . . . . I remember, on one occasion in particular, my wife was so much disturbed by the continued noise of the music during the evening performance that she left the drawing-room, and occupied another room. The noise and disturbance occasioned by the said performances, and the crowds coming away from the same, would, if continued, as was intended, for two months, have become a great nuisance to myself and my family, and in case of illness it might be productive of serious consequences."

L. JJ.
1869
INCHBALD
v.
ROBINSON.
INCHBALD
v.
BARRINGTON.

The Plaintiff's wife stated:—"During nearly the whole of the performances music was going on. In the dining-room of my house, with the windows and shutters closed, I could distinctly hear such music and the other noises attending the performance. In my children's nursery, with the windows shut, I could distinguish many of the tunes played in the circus. I could also distinctly hear the cracking of the whips, the talking of the clowns, together with the laughter, stamping, and applause of the audience. The noises from the circus were a great nuisance to me, and caused great annoyance and irritation to me, and prevented my enjoying the ordinary peace and quiet of my house, and following with comfort my accustomed occupations."

Gillespie and *Thomson*, two clerks of the Plaintiff's solicitors, severally deposed to the music, and noises arising from applause and other causes, within the circus, having been distinctly heard by them in the Plaintiff's dining-room, with the windows and shutters closed.

Mr. *Purnell* deposed that when dining at the Plaintiff's house on the 21st of September, 1867, "although the windows and the shutters were closed and fastened, and several persons were talking in the room, I could distinctly hear, above the conversation, the music, shouting, and applause of the people in the circus."

Miss *Weeding*, of No. 4, *Park Terrace*, deposed:—"The performances occasioned great noise and disturbance, and attracted great numbers of noisy persons, and materially interfered with the comfortable occupation of my house, and had the said last-mentioned performances been continued, as I am informed and believe was intended, for two months, they would have been a very great nuisance to me and the occupants of my house."

Miss *Ward*, the occupier of Nos. 6 and 7, *Park Terrace*, and Mr. *Cosnett*, of No. 7, *Park Lane*, severally deposed that the noise in the circus was heard in their houses with the windows and shutters closed, and that the noise and disturbance occasioned by the performances, and the crowds coming away from the same, would, if continued for two months, have been a very great nuisance, and, in case of illness, might be productive of serious consequences.

There was no substantial contradiction of any part of the above evidence.

The occupier of No. 3, *Park Terrace*, and his wife, deposed that when *Barrington* was there, as mentioned in his affidavit, he left before the performance had begun, and that when it began the noise was heard distinctly inside the house.

There were various affidavits as to crowds which did not carry the case higher than the evidence given by an inspector of police, who was examined before the Examiner. "The entrance to the circus from *Park Lane* was directly opposite *Park Terrace*, and I have seen persons crowding within the field from 50 to 100 in number. I have seen, from time to time, a collection of from 10 to 25 persons in *Park Lane*, and I have seen the audience, consisting of 300 or 400 persons, coming out. A number of persons were from time to time in *Park Lane* with barrows and baskets, calling out oranges and fruit for sale, and I found it necessary from time to time to order them to move, but they returned on every opportunity when the backs of the police were turned. There was a great noise at the end of the performance from the shouting of unruly boys and half-grown men. The performance generally lasted until about eleven o'clock at night."

Mr. *Glasse*, Q.C., Mr. *Swanston*, Q.C., and Mr. *A. E. Miller*, for the Appellant in *Inchbald* v. *Robinson* :—

The Plaintiff is only a tenant from year to year, and not to be favourably regarded: *Jacomb* v. *Knight* (1). It is a mere case of prospective nuisance of a temporary description. The Court, even since *Sir J. Rolt's Act*, will always send a case of nuisance to be tried by a jury: *Eaden* v. *Firth* (2); and in this case nothing amounting to nuisance is proved. *Bostock* v. *North Staffordshire Railway Company* (3) does not go the length of supporting the Plaintiff's case, for it was a case of trespass for which damages afforded no adequate remedy. Here they are an ample remedy. *Walker* v. *Brewster* (4) proceeds on three grounds, not one of which exists in the present case. In *White* v. *Cohen* (5) a very serious case of personal inconvenience was made out. It is impossible to maintain the decision of the Vice-Chancellor in the

(1) 11 W. R. 812.
(2) 1 H. & M. 573.
(3) 5 De G. & Sm. 584.
(4) Law Rep. 5 Eq. 25.
(5) 1 Drew. 312.

L. JJ. 1869 INCHBALD v. ROBINSON. INCHBALD v. BARRINGTON.

present case without holding that a circus must necessarily be a nuisance, however it be constructed, and however managed. There are only three cases in the books turning on noise: *Elliotson* v. *Feetham* (1); *Soltau* v. *De Held* (2), where a verdict at law had been obtained, and the nuisance was continual, not, as here, temporary; and *Eaden* v. *Firth* (3), where it was laid down that in such a case there must be a verdict at law before injunction. Moreover, here the nuisance arising from noise is not put in issue, and the case as to crowds is very weak.

Mr. *Karslake*, Q.C., and Mr. *Elderton*, for the Plaintiff:—

This is a mere appeal for costs, the whole subject matter of the suit having disappeared, as the ground has since been covered with buildings: *Sivell* v. *Abraham* (4); *Morgan* v. *Great Eastern Railway Company* (5); *Wilde* v. *Wilde* (6). The collection of a noisy crowd is in itself a nuisance, without the noise of the performance: *Walker* v. *Brewster* (7); *Rex* v. *Moore* (8).

Mr. *Glasse*, Q.C., Mr. *Swanston*, Q.C., and Mr. *A. E. Miller*, for the appeal in *Inchbald* v. *Barrington*:—

The evidence as to crowds in this suit does not shew anything which the Court will consider to amount to a nuisance. As regards the noise of the performances, it is evident that the Plaintiff's evidence is grossly exaggerated, and nothing is shewn amounting to a nuisance, but only something which may be disagreeable to a person who wishes for an extra amount of quiet.

A reply was not called for in *Inchbald* v. *Robinson*; and Mr. *Karslake*, Q.C., and Mr. *Martineau*, who appeared for the Plaintiff in *Inchbald* v. *Barrington*, were not called on in that suit.

SIR C. J. SELWYN, L.J.:—

We can now dispose of both these appeals, which stand on very different grounds. A number of cases have been referred to, but the law applicable to the subject is now well settled, and has been

(1) 2 Bing. N. C. 134.
(2) 2 Sim. (N.S.) 133.
(3) 1 H. & M. 573.
(4) 8 Beav. 598.
(5) 1 H. & M. 78.
(6) 10 W. R. 503.
(7) Law Rep. 5 Eq. 25.
(8) 3 B. & Ad. 184.

clearly laid down by Lord *Cairns* in the present case. The Court cannot enter into such a question as whether a circus at a particular distance from a house must be a nuisance, nor, when a circus has been erected, is the Court bound to have it tried at law whether it is a nuisance. The Court may, if it thinks fit, send the question of nuisance to be tried by a jury, but it is not bound to do so, and if the evidence is clear, the duty of the Court is to dispose of the case at once.

As regards *Inchbald* v. *Robinson*, the first objection taken was that the appeal relates only to costs. It is an unfortunate circumstance that the case has been discussed after the subject matter of the suit has disappeared, for the land has been built over, so that the question of the right to erect a circus upon it cannot henceforth arise. Still, the appeal is not merely an appeal for costs; the Defendant has a right to have it decided whether the Plaintiff had any ground of complaint against him. The Plaintiff, by his bill, states that the circus of the preceding year had caused a nuisance by drawing together a large number of disorderly persons, but does not state that the noise was such as to be a nuisance; and he then alleges that the projected circus will necessarily draw similar crowds together so as to be a nuisance, but he alleges nothing about the noise of the performances, nor is there any distinct allegation that the new circus will be conducted like the former one. The case, therefore, is simply rested on the drawing crowds together, and it is not carried sufficiently high. No doubt, the drawing crowds together may be a nuisance; but all the circumstances have to be considered. One circumstance which has been much urged is, that the Plaintiff is only a yearly tenant. He has, however, been many years in the house, and is not to lose his rights because he is only a yearly tenant; still it is a circumstance to be considered. Again, it is said that the annoyance was to last only for a short time. This would have been a most important consideration if the time had only been a few days, and the Court will be more strict as to proof in the case of a nuisance only lasting eight weeks than in the case of a permanent one. The case of *Rex* v. *Moore* (1) was pressed upon us, but the circumstances there were completely different; this is a case of an in-door performance, that

(1) 3 B. & Ad. 184.

L. JJ.
1869
INCHBALD
v.
ROBINSON.
INCHBALD
v.
BARRINGTON.

was a case where pigeon-shooting took place in the open air, and crowds of people assembled outside the inclosure to shoot at the stray pigeons. *Walker* v. *Brewster* (1), which was much relied on, was also a case of out-door performance, where people would assemble outside the ground, since the fireworks could be seen and the band heard almost as well outside the ground as within it. The rule is well deduced from the cases by Mr. *Kerr* in his work on Injunctions (2), and the evidence here falls far short of bringing the case within that rule. The Plaintiff cannot complain of the temporary crowding occasioned by people going to the circus or leaving it; and no such continuous crowding is shewn as to justify the interference of the Court.

Inchbald v. *Barrington* stands on a different footing, for the case is not rested merely on the crowds, but it is alleged that the noise of the performance is a nuisance. I dismiss the first point, for I do not think that any such crowding as amounts to a nuisance is proved. But the case as to noise stands in a very different position from that in which it stood before Lord *Cairns*. When it came before his Lordship there was uncontradicted evidence that the noise of the performances could not be heard inside the houses in *Park Terrace*. This evidence has since been completely rebutted, and we have now before us the evidence of the Plaintiff and his wife, corroborated by that of seven independent witnesses, shewing that the noise of the performances was heard inside the houses to such a degree as materially to interfere with the comfort of the inhabitants, according to ordinary habits of life. This evidence is uncontradicted, and I am of opinion that it establishes a case of nuisance calling for the interference of this Court. The appeal in *Inchbald* v. *Barrington*, therefore, fails.

SIR G. M. GIFFARD, L.J.:—

It has been contended on behalf of the Plaintiff that these appeals are appeals as to costs, but that is not so, for in each case an injunction was granted, and the Defendant has a right to have the question tried whether it ought to have been granted. Then it was urged on behalf of the Appellant that an injunction ought not to be granted to restrain a nuisance until it has been ascertained

(1) Law Rep. 5 Eq. 25. (2) Page 337.

by an issue or an action at law that what is complained of is a nuisance. But, however the matter may have stood before the passing of Sir *John Rolt's Act*, I am of opinion that the Court must now deal with the question of nuisance or no nuisance in the same way as it deals with any other question within its jurisdiction depending on a disputed matter of fact. If the evidence is satisfactory to the mind of the Court, the Court will decide upon it without more; if the evidence is not satisfactory, the Court can send the matter to a jury; but I am satisfied that it was not the intention of the Act that a case should, as a matter of course, be sent to be tried by a jury whether the circumstances required it or not, and I am of opinion that there is no occasion for a trial by jury in either of these suits.

In *Inchbald* v. *Robinson* the whole of the case made by the bill is, that the circus will draw together a great crowd of disorderly persons. The evidence in support of this allegation is insufficient, and if an injunction in such a case were to be granted and upheld, it would prevent the setting up near a dwelling-house any exhibition likely to be attended by a large number of people.

As regards the second suit, the allegations as to nuisance from crowds are not supported by the evidence. It is clear, however, from the evidence before us, which was not before Lord *Cairns*, that the music and noises in the circus were heard distinctly all over the Plaintiff's house for several hours every night. This was something materially interfering with the comfort of the inhabitants, according to ordinary habits of life; and I am of opinion that the injunction in the suit of *Inchbald* v. *Barrington* was rightly granted.

Solicitors: Messrs. *Bischoff, Bompas, & Bischoff;* Messrs. *G. S. & H. Brandon.*

L. JJ.
1869
March 23.

MIDLAND BANKING COMPANY *v.* CHAMBERS.

Creditors' Deed—Guarantee—Surety—Dividend on full Amount of Debt.

A bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of £300, which guarantee provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bankruptcy. His banking account was overdrawn £410. The mortgage was realized, and the surety paid the bank the £300 secured by it:—

Held (affirming the decree of *Malins*, V.C.), that the bank was not restricted to proof for the balance of £110, but was entitled to receive dividends on the whole £410, not receiving in the whole, including the £300, more than 20*s.* in the pound.

THIS was an appeal by the Defendants from a decree of Vice-Chancellor *Malins* (1).

The Plaintiffs were bankers at *Sheffield*. In 1865 they agreed to allow *Mercer*, a customer of theirs, to overdraw his account, on the following guarantee being given them by *J. Thorpe*.

"In consideration of your opening an account with Mr. *F. J. Mercer*, and advancing to him at any time the sum of £300 at my request, I hereby guarantee to you the repayment of all moneys which shall at any time be due from him to you on the general balance of his account with you, and I hereby declare that this guarantee shall be a continuing guarantee to the extent, at any one time, of £300; and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money for the time being due upon such general balance as aforesaid; but shall extend to cover and be a security for every and all future sum and sums of money at any time due to you thereon, notwithstanding any such payment or liquidation. And I further declare that you may grant to the said *F. J. Mercer*, or to any drawers, acceptors, or indorsers of bills

(1) Law Rep. 7 Eq. 179.

of exchange or promissory notes received by you from him, any time, or other indulgence, and compound with him or them respectively without discharging or satisfying my liability; and that all dividends, compositions, and payments received from them or him respectively, shall be taken and applied as payments in gross, and that this guarantee shall apply to and secure any ultimate balance that shall remain due to the said company; and I further declare that this guarantee shall continue to be binding notwithstanding any changes that may from time to time take place in the shareholders in the said *Midland Banking Company, Limited.*"

On the 6th of January, 1866, *Mercer* assigned all his estate and effects to *Thomas Chambers* and *John Thorpe* in trust for the payment of his debts, to be applied in the same manner as if he had been adjudged bankrupt. This deed was registered under the *Bankruptcy Act*, 1861, s. 194.

At the time of the execution of the deed there was due from *Mercer* to the Plaintiffs on the balance of his account the sum of £410 4*s.* 11*d.* In May, 1866, *Thorpe* paid over to the Plaintiffs £300 in discharge of his guarantee. *Mercer*, it appeared, had given to *Thorpe* a mortgage to indemnify him against all claims on the guarantee. The mortgaged property was sold by the trustees of the creditors' deed, and the £300 paid to *Thorpe*, and the £300 which he paid to the Plaintiffs was, in fact, the £300 which he thus received under the counter security.

The trustees contending that the Plaintiffs were entitled to prove only for £110 4*s.* 11*d.*, being the balance due from *Mercer* after deducting the £300, the present bill was filed asking that the trusts of the creditors' deed might be administered by the Court, and that it might be declared that the Plaintiffs were entitled to a dividend on their whole debt. Vice-Chancellor *Malins* made a declaration accordingly, and the trustees appealed.

Mr. *Cotton*, Q.C., for the Appellants, asked for the decision of the Court on the question whether the jurisdiction was not in Bankruptcy, as it was settled that it would have been if the deed had been registered under sect. 192. The question was raised on the answer, but had not been argued below in conse-

L. JJ. 1869

MIDLAND BANKING CO. v. CHAMBERS.

quence of the decisions in *Ex parte Morgan* (1), and *Pearson* v. *Pearson* (2).

SIR C. J. SELWYN, L.J.:—

It is not desirable that we should decide a case which was not argued in the Court below. As no objection to the jurisdiction was taken before the Vice-Chancellor, we shall hear the case on the merits.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the Appellants, then contended that although a surety might by his contract of suretyship give up in favour of the creditor the right which he would otherwise have, after paying the whole amount for which he was liable, to prove against the bankrupt debtor's estate, and might by so doing enable the creditor to prove for the whole amount of his debt, after having received from the surety that part of the debt for which the surety was liable, the creditor could not have such right where the surety had been paid in full out of the bankrupt's estate by means of a security given to him by the bankrupt. They also contended that upon the construction of the guarantee it was not intended to give this right. They referred to *Ex parte Hope* (3), and *Thornton* v. *M'Kewan* (4).

Mr. *De Gex*, Q.C., and Mr. *Bristowe*, for the Plaintiffs, were not called upon.

SIR C. J. SELWYN, L.J.:—

There are two questions in this case. One as to the construction of the guarantee, the other as to the effect of *Thorpe* having been fully paid by means of his counter-security. It is settled by *Thornton* v. *M'Kewan*, and other cases, that where a surety who is liable for part of a debt has paid the whole of what he is liable for, he is entitled to stand in the place of the creditor to that extent against the estate of the bankrupt debtor. The surety may, however, in his contract of suretyship agree to waive this right for the benefit of the creditor, and the question is, whether the surety did so in the present case. I am of opinion that the clause in the

(1) 1 D. J. & S. 288.
(2) Law Rep. 1 Ex. 308.
(3) 3 M. D. & D. 720.
(4) 1 H. & M. 525.

latter part of the guarantee was intended to exclude the surety from the right to have a share in the benefit of the proof, and to allow the creditor to receive the full amount of the dividend. This being so, there only remains the question whether the position of the creditor is affected by the fact that the surety has been fully paid by means of the security given him by the debtor. This question is answered by *Ex parte Hope* (1), which differs from the present case only in this, that there the debt was joint, and the security given to the surety was upon the separate estate of one of the bankrupts; but the judgment treats that distinction as clearly immaterial. The Lord Justice *Knight Bruce*, then Chief Judge in Bankruptcy, says (2), "The agreement would, I conceive, have been clearly effectual and binding between the creditor and surety if the surety had not, by means of his mortgage, or otherwise, received payment from the assignees or from the bankrupt's estate, and if so, I do not see why their redemption of the mortgage, or the payment of the surety in any other way out of the bankrupt's estate, should vary the rights of the creditor. I think that they must take the surety's rights, if they take them at all, as he had them himself; that they cannot make any claim against the creditor's dividends which the surety could not have made; that he could not have made this claim, and that their Petition must be dismissed. I may observe that I have not stated the facts specifically as they appear, nor, indeed, do all the facts clearly appear; but I have meant to state, and I believe that I have stated, the case in a manner as favourable as possible to the Petitioners. The debtor was, in truth, a firm of several persons in partnership together, and the mortgaged estate seems to have been the separate property of one of the firm, a circumstance which appears to me to make no difference, at least in favour of the Petitioners. I suppose that if it had been made originally to the Respondents, it would not have affected their right of proof against the firm." It such a transaction as this were entered into with any fraudulent purpose different considerations would arise, but nothing of the kind is suggested. The case is the simple case of a surety who is fully paid by means of a counter-security given him by the bankrupt debtor, and the appeal must be dismissed with costs.

(1) 3 M. D. & D. 720. (2) 3 M. D. & D. 725.

L. JJ. 1869 MIDLAND BANKING CO. v. CHAMBERS.

SIR G. M. GIFFARD, L.J.:—

I quite agree with the opinion of the Vice-Chancellor, and do not think that there is any reasonable doubt as to the meaning of the guarantee, for it in terms refers to dividends received from the principal debtor, which must apply to dividends from his estate. I also agree in the view that the circumstance of *Thorpe* having been repaid by means of the counter-security does not make any difference in the rights of the Plaintiffs. The principle is this—if the surety had paid the £300 out of his own money he would have had the benefit of proof for that amount, and that benefit he has relinquished in favour of the Plaintiffs. The argument that it has been paid out of the debtor's estate is a fallacy; it was paid out of something which, having before the execution of the creditors' deed been dedicated to the purpose of indemnifying the surety, was not, at the time of the execution of that deed, part of the debtor's estate. Such a payment stands on the same footing as if it had been made by *Thorpe* out of his own moneys, and furnishes no ground for reducing the proof.

Solicitors: Messrs. *Sole, Turner & Turner;* Messrs. *Singleton & Tattershall.*

L. JJ. 1869 *Jan.* 12, 13.

LANGTON *v.* WAITE.

Mortgagor and Mortgagee—Offer by Plaintiff—Incapacity to fulfil Offer.

8 Ch 356
5 Ch D. 419

The Plaintiff transferred stock to the Defendants by way of security for three months. The Defendants, unknown to the Plaintiff, sold the stock, and on his repaying the loan at the end of the three months transferred to him a like amount of stock which they had bought for much less than the sum for which they had sold the Plaintiff's stock. The Plaintiff having discovered that his stock had been sold, filed his bill to charge the Defendants with the profit they had made, offering to retransfer to them the stock they had transferred to him, and he obtained a decree on this footing. On prosecuting the decree, it turned out that the Plaintiff before filing his bill had mortgaged and, before filing his amended bill, had sold the stock which the Defendants had transferred to him, which fact he had not noticed in his amended bill. It being thus impossible for him to retransfer the stock, he presented a Petition asking that he might be at liberty to transfer to the Defendants a like amount of the same stock, and the Vice-Chancellor made an order accordingly:—

Held, on appeal, that the Petition was inconsistent with the decree, and

ought to have been dismissed; and that as the Plaintiff had by his own act made himself incapable of performing the offer in his bill, and not stated the real facts on the pleadings, the bill must also be dismissed.

THIS was an appeal by the Defendants from a decree of Vice-Chancellor *Malins* (1), and from a subsequent order made by His Honour on the petition of the Plaintiff.

The case made by the bill was shortly this:—The Plaintiff, in December, 1865, transferred to the Defendants £22,000 *Grand Trunk of Canada Railway* stock, as security for £6000 and interest for three months. At the end of the three months the loan was paid off, and the Defendants transferred to the Plaintiff £22,000 *Grand Trunk of Canada Railway* stock; but, as the Plaintiff subsequently discovered, the sum so transferred was not the identical sum of stock which the Plaintiff had transferred to them, the Defendants having in the meantime sold the Plaintiff's stock, and afterwards purchased a like amount of such stock for a less sum, which stock so purchased they transferred to the Plaintiff. The bill prayed for an account of the profit thus made by the Defendants, and for payment to the Plaintiff of the sum for which the Defendants had sold his stock, the Plaintiff offering, upon such payment being made, to retransfer to the Defendants the stock which they had transferred to him. Vice-Chancellor *Malins* being of opinion that the sale of the stock by the Defendants was an unauthorized act, made a decree declaring that the Defendants were chargeable with the amounts for which they sold the stock. The decree then directed an account of what was due from the Defendants to the Plaintiff on that footing, after deducting the debt and interest, and ordered "that the Plaintiff upon payment of the balance which shall be certified to be due to him from the Defendants as hereinbefore directed, do retransfer the sum of £22,000 stock of the *Grand Trunk Railway of Canada*, transferred by the Defendants to the Plaintiff as in the pleadings mentioned, to such person or persons as the Defendants shall direct."

In working out the decree in Chambers it appeared that the Plaintiff was unable to carry into effect his offer to transfer to the Defendants the stock which they had transferred to him, inasmuch as he had sold it, of which fact no notice was taken in the bill,

(1) Law Rep. 6 Eq. 165.

L. JJ. 1869 LANGTON v. WAITE.

though it had been amended after the sale. The Plaintiff thereupon presented a Petition stating the fact of the sale, and praying that he might be allowed to transfer to the Defendants the same amount of stock, or to account to them for the moneys which he had received from the sale of the stock. The Vice-Chancellor made an order in the Plaintiff's favour, and the Defendants appealed both from this order and the decree.

Sir *Roundell Palmer*, Q.C., Mr. *Pearson*, Q.C., and Mr. *Currey*, for the Appellants, referred to *Mowatt* v. *Blake* (1); *Ex parte Dennison* (2); *Lockhart* v. *Hardy* (3); *Palmer* v. *Hendrie* (4); *Walker* v. *Jones* (5); *Humble* v. *Hunter* (6); *Brown* v. *Cole* (7); *Bird* v. *Heath* (8); *Brookfield* v. *Bradley* (9).

Mr. *Cotton*, Q.C., and Mr. *W. Morris*, for the Plaintiff.

Sir *Roundell Palmer*, in reply.

SIR C. J. SELWYN, L.J.:—

It is a matter of great regret that a case like this, which involves questions of considerable importance, not only to the parties, but also to the numerous classes of persons who are engaged in similar transactions, should, after a litigation of more than two years and a half, come before us under such circumstances as to render it impossible for us to decide the different questions which have been raised in the suit. We are unable to do so by reason of the conduct which the Plaintiff has thought fit to adopt with respect to matters which, in our judgment, are very material with reference to the relief which he has sought. And, as the questions in this suit may be the subject of future litigation, I think it right to abstain, as far as possible, from expressing any opinion on them. I wish, however, to be understood as not expressing any dissent from the general view of the case which has been taken by the Vice-Chancellor, either with respect to the law or the facts, and it is not necessary for us to decide upon the propriety of that portion of the

(1) 31 L. T. 387.
(2) 3 Ves. 552.
(3) 9 Beav. 349.
(4) 27 Ibid. 349.
(5) 3 Moo. P.C.(N.S.) 397; Law Rep. 1 P.C. 50.
(6) 12 Q. B. 310.
(7) 14 Sim. 427.
(8) 6 Hare, 236.
(9) 2 S. & S. 64.

decree which declares that the Defendants are chargeable with the market price of the stock sold by them. [His Lordship then shortly stated the allegations and prayer of the bill, and the nature of the decree, and continued :—]

The allegations therefore, and the prayer of the Plaintiff's bill, and the decree which he has obtained, are all alike founded upon the statement that he has in his possession, and is able to deal with, and to comply with the offer which he has made by dealing with, the sum of £22,000 *Grand Trunk of Canada Railway* stock, which had been transferred to him by the Defendants; but it now appears, and is, in fact, stated in the Petition presented by himself in the month of July, 1868, that as early as the 14th of April, 1866, he had transferred this stock by way of mortgage, and at different times between the 22nd of June, 1866, and the 18th of December, 1866, he had, with the concurrence of his mortgagees, absolutely disposed of the whole of it. It appears, therefore, that this transfer to the mortgagees was made before the original bill was filed, and that the sale of the entirety of the stock was made before the re-amended bill was filed, and under those circumstances the Plaintiff comes before the Court making this offer, and obtaining a decree upon a condition which he has put it out of his power to comply with. It was argued on his behalf, that to decide the case upon this ground would be to decide it upon merely a technical ground. But, in my judgment, the offer is a most substantial portion of the Plaintiff's case, and is, in fact, the very foundation of his bill, and of the decree which he has obtained. Upon the Plaintiff's Petition, stating the real facts of the case, the Vice-Chancellor has made an order which, in my judgment, was inconsistent with the decree, and beyond the power of the Court to make. We do not, under the circumstances of the case, think it right to preclude the Plaintiff from raising any question that may be properly brought before the Court in any subsequent suit; but as the present suit has been rendered wholly useless by his failing to state, as he ought to have done, facts not within the knowledge of the Defendants, but within his own knowledge, justice requires that he should pay the whole of the costs of the suit up to and including the hearing of the cause, and also the costs of the Petition, and that the Petition and the bill should be dismissed, but without

L. JJ. 1869 LANGTON v. WAITE.

prejudice to any other suit or action, and that all sums which, under the decree, have been paid by the Defendants to the Plaintiff should be repaid.

SIR G. M. GIFFARD, L.J.:—

The appeal in this case is from a decree and from an order made on a Petition. The decree proceeded upon the footing of ordering a retransfer by the Plaintiff to the Defendants of the stock which had been transferred by the Defendants to him. Regard being had to the allegations in the bill, it certainly was a very material allegation that he had that stock actually in his possession, and his bill proceeds upon the footing of repudiating the possession of that stock. Consistently with the allegations in the bill, and consistently with the facts before the Vice-Chancellor, when he heard the cause, it was impossible that he could have made any decree otherwise than upon the terms of ordering a retransfer of this identical stock, and accordingly the decree was made in that form. It turned out afterwards, that in point of fact, although the Plaintiff went to a hearing with these allegations, he had, first of all mortgaged, and subsequently sold the stock, and had done so at a time when he might have put in issue the real facts of the case. That he did not do, and after the matter had gone into Chambers, and there had been a certificate, he presented a Petition stating the real facts of the case, and asking, in reality, a very substantial variation of that decree. I am very clearly of opinion that upon that Petition no other order should have been made than that of dismissing it with costs, but we have before us not only that Petition but the whole cause, and we have the whole cause before us upon an allegation from the mouth of the Plaintiff himself, saying, in point of fact, that he did not bring before the Court that which it was material for the Court to know in order to do justice between the parties. That being so, without determining anything upon the merits of the case, for the merits cannot be properly determined in this state of things, we are in a position to dismiss the bill with costs, on the ground that the Plaintiff suppressed that which he ought to have stated to the Court; and of course we are in a position to dismiss, and we do dismiss, the Petition, on the ground that it is wholly inconsistent with the

practice of the Court, upon a Petition, and upon facts so stated, to alter substantially, which this order does, the decree which was made on the hearing of the cause. We do so without prejudice to a new bill being filed. If I had been of opinion that there had been on the part of the Plaintiff anything like a fraudulent suppression of material facts, I certainly should not have concurred in adding that qualification, but I am inclined to think that the suppression was rather inadvertent than fraudulent, because if he had been at all aware what the result of the suppression must be, and had understood the matter, it is perfectly clear to me that his bill would have been framed in a different form, and that he would have taken care not to have had the decree in the form in which he took it. Therefore, upon the ground that the suppression, though most improper, was not fraudulent, we dismiss his bill with costs, and without prejudice to any future proceedings he may think fit to take.

Solicitors: Messrs. *Ashurst, Morris & Co.*; Messrs. *R. & S. Mullens.*

SPIRETT *v.* WILLOWS.

Married Woman—Equity to a Settlement—Form of Settlement.

A settlement was directed of three-fourths of a fund belonging to the wife of a bankrupt. Questions having arisen as to the proper form of the settlement:—

Held, that the power of investment ought to be confined to the securities on which cash under the control of the Court may be invested:

Held, as regarded the limitations in the settlement, that it ought to be framed in a proper and usual way with regard to the interests of the wife and children, and without any particular regard to the interests of the assignee; and that a power of advancement which could be exercised in favour of children under age was proper, though objected to as injurious to the assignee, but the ultimate limitation in default of children should be to the assignee.

The settlement, as approved in the Court below, gave the fund in default of appointment to the children as tenants in common, without any qualification:—

Held, that it ought to be altered, so that children dying under twenty-one and unmarried should not take interests transmissible to their representatives.

THIS case came before the Court on questions as to the form of a settlement to be made by virtue of a married woman's equity to a settlement.

L. JJ. 1868-9 SPIRETT v. WILLOWS.

Mrs. *Willows*, at the time of her marriage, was entitled to a mortgage for £4000. This mortgage, on the day before her marriage, was transferred to *Fulstow* and *Hart*, in trust as to one moiety for Mrs. *Willows* for life, for her separate use, with remainder to her children, and as to the other moiety in trust for her absolutely. Some time afterwards a post-nuptial settlement was made of the second moiety. The Plaintiff, who was a creditor of the husband, shortly afterwards took proceedings against him in bankruptcy. *Willows* was adjudged bankrupt and the Plaintiff was the assignee, and the only creditor who proved. The Plaintiff then filed his bill to set aside the post-nuptial settlement, and obtained a decree by which the settlement was declared void as against him, but subject to the wife's equity to a settlement; and it was declared that so much of the £2000 (the second moiety of the £4000) as was not required for the purposes of any settlement under the inquiry thereinafter directed was applicable in payment of the Plaintiff's debt, and interest thereon; and the decree contained an inquiry whether any and what settlement ought to be made on the wife out of the second moiety of the £4000 (1). The Chief Clerk of Vice-Chancellor *Stuart* certified that the whole £2000 ought to be settled; but by an order made on the 17th of July, 1865, on further consideration, and on an application to vary the certificate, it was declared that it was fit and proper that out of the £2000 the sum of £1500 should, subject as thereinafter mentioned as to costs, be settled in trust for the separate use of Mrs. *Willows* for her life, without power of anticipation, with remainder in trust for her children or other issue, by her then present or any future marriage, equally, or their issue, the issue only taking the parent's share; and in default of the Defendant, *Elizabeth Willows*, having any children, then in trust for the Plaintiff, *William Spirett*, as assignee of the Defendant *Henry Willows*, the husband of *Elizabeth Willows*. And it was ordered that the residue of the £2000 should be paid to the Plaintiff *William Spirett*, first, on account of his costs of the suit, and then on account of his claim as assignee of *Willows*. Then, after directions for payment of certain costs out of the £1500, it was ordered that a proper settlement by the Judge in Chambers should be made and executed by all proper parties, as the Judge should

(1) 3 D. J. & S. 293.

direct, of the residue of the £1500, according to the aforesaid declaration, and liberty to apply was given. Mrs. *Willows* appealed to obtain a variation of this order, but the order was affirmed (1).

A draft settlement was accordingly prepared, and, notwithstanding various objections taken to it by the Plaintiff, was approved by Vice-Chancellor *Stuart*. The Plaintiff now moved by way of appeal from an order of Vice-Chancellor *Stuart* refusing to discharge the certificate approving of it.

Objections were taken to the settlement by the Plaintiff in respect of the following points:—

1. The power of investment was not confined to securities on which cash under the control of the Court might be invested, but extended to authorize investments in railway preference shares or debenture stocks.

2. In the event of Mrs. *Willows* not exercising a power of appointment which was given her in favour of her children and issue, a trust was declared in favour of all the children or any the child of Mrs. *Willows*, and if more than one in equal shares, without any qualification as to their attaining twenty-one or marrying.

3. The settlement contained a power of advancement which might be exercised in favour of children under age.

4. The ultimate limitation in default of children of the marriage was as follows:—

"Upon trust for the said *William Spirett* as such assignee in bankruptcy of the said *Henry Willows*' estate as aforesaid, or other the assignee or assignees in bankruptcy for the time being of the said *Henry Willows*' estate, or if at the time when the present trust shall come into operation there shall be no debt, claim, or demand in existence proved or proveable under the aforesaid bankruptcy against the estate of the said *Henry Willows*, or there being any such debt, claim, or demand in existence, then, subject thereto," upon trust to transfer the fund to the trustees of the post-nuptial settlement to be held by them upon the trusts thereof.

April 23, 1868. Mr. *Phear*, for the appeal motion, referred to *Ward* v. *Yates* (2).

(1) Law Rep. 1 Ch. 520. 12 Jur. (N.S.) 538. (2) 1 Dr. & Sm. 80.

L. JJ. 1868-9

SPIRETT v. WILLOWS.

Mr. *Horton Smith*, for the Defendants other than *Fulstow* and *Hart*.

Mr. *Nalder*, for *Fulstow* and *Hart*.

SIR W. PAGE WOOD, L.J.:—

We think that the power of investment ought to be confined to those securities on which cash under the control of the Court might be invested. As regards the limitations and powers in favour of the children, we think that what the Court has to look to is, that this portion of the fund should be settled in a usual and proper form for the benefit of the wife and children, without any particular regard to the rights of the assignee, which must be considered as having been sufficiently provided for by the portion of the fund which is given up to him. We think that the trust for the children in default of appointment should be modified in the usual way, so that sons who die under twenty-one, and daughters who die under twenty-one and unmarried, may not take interests transmissible to their representatives, this being the mode most beneficial to the family. We think that the power of advancement ought to be retained. It is a usual power, and beneficial to the children; and that being so, we think, for the reasons I have stated, that its being possibly disadvantageous to the Plaintiff is not to be regarded. We think that the ultimate limitation must be altered into a limitation to the Plaintiff as assignee of *Willows*, so that he may, if it be thought expedient, be able to sell it at once as a reversionary interest.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. As regards the ultimate limitation, I think that the Court cannot look to the fact that there is only one creditor in the bankruptcy. The trust ought not to be made contingent, but should be an immediate trust for the assignee, subject to the prior trusts.

April 16, 1869. An order was now made finally approving of the settlement as altered.

The settlement, in its ultimate form, was made between the Plaintiff of the one part, and Mrs. *Willows*, now a widow, of the other part; and, after recitals of the proceedings, it was declared that, in pursuance of the orders, *Fulstow* and *Hart* and the survivor of them, &c., should out of the £862 (which was the residue of the £1500 after paying costs) pay certain other costs when taxed, and either permit the surplus to remain in its actual state of investment, or, with the consent of Mrs. *Willows* during her life, and after her death at the discretion of the trustees or trustee, call it in and invest it in £3 per Cent. Bank Annuities, Bank Stock, *East India* Stock, Exchequer Bills, or £2 10*s.* per Cent. Bank Annuities, or upon mortgage of freehold or copyhold estates in *England* or *Wales*, but not in any other mode of investment; with power, with such consent, or at such discretion as aforesaid, to vary investments.

The trusts were then declared to be for Mrs. *Willows* for life, for her separate use, free from the control of any husband, with a restraint on anticipation. Then followed a power of appointment to all or any of the issue of Mrs. *Willows* by any future husband living at the date of the settlement, such issue to be born during her life or the life of such husband, or within twenty-one years after the death of the survivor; and in default of appointment the fund was to be held in trust for all her children or any her child who being sons or a son should attain twenty-one years, or being daughters or a daughter attain that age or marry under that age. Then followed a clause providing that if any such child should die in the lifetime of Mrs. *Willows* leaving issue living at her death, such issue should take *per stirpes* the share of such deceased child. The settlement contained the usual hotchpot, advancement, maintenance, and accumulation clauses, and a power of appointing new trustees, the power of advancement during the lifetime of Mrs. *Willows* requiring her consent in writing. The ultimate trust was in favour of the Plaintiff as assignee in bankruptcy of *Willows*.

Solicitors: Mr. *F. W. Blake;* Messrs. *Blakeley & Beswick;* Messrs. *Coverdale & Co.*

L. JJ.
1869
March 18.

In re CLARK.
CUMBERLAND *v.* CLARK.

Practice—Administration Suit—Costs of Plaintiff whose Suit is stayed.

W. filed a creditors' bill to administer *C.'s* estate. An administration decree having shortly afterwards been made in a second suit, an order was made staying proceedings in the first suit, and directing *W.'s* costs to be taxed, and to be paid by the executrix out of the assets. An order on further consideration was made in the second suit, ordering payment, first, of the costs of the executrix, and then of the Plaintiff; but not providing for *W.'s* costs. *W.* then applied by summons for an order for payment of his costs of the first suit. He was offered an order for payment of them *pari passu* with the costs of the Plaintiff, but declined it. Upon which his application was refused. *W.* then appealed:—

Held, that the order for payment of *W.'s* costs by the executrix out of the assets did not give them priority over the costs of the second suit; and that as *W.* had refused to accept an order giving him all he was entitled to, his appeal must be dismissed.

THIS was a motion by way of appeal from a decision of the Master of the Rolls.

On the 6th of November, 1866, *Webber*, the present Appellant, filed a bill on behalf of himself and all other the creditors of *Jonathan Clark*, for the administration of his real and personal estate, the Defendant being the widow, who was executrix and sole devisee and legatee.

On the 26th of November, 1866, an order for administration of *Clark's* real and personal estate was obtained on summons by another creditor in the Chambers of the Master of the Rolls. The Defendant then moved before Vice-Chancellor *Stuart*, to whose Court the cause was attached, to stay proceedings in the cause, and on the 24th of January, 1867, Vice-Chancellor *Stuart* made an order "that all proceedings in this cause be stayed; that the costs of the Plaintiff, *A. Webber*, of this cause, up to and including this application, be taxed by the Taxing Master; that the said costs when taxed be paid to the said *A. Webber* by the said Defendant *S. E. Clark*, the executrix of *J. Clark*, deceased, the testator in the pleadings named, out of the assets of the said *Jonathan Clark*; that the said *A. Webber* be at liberty to go in under the

decree dated the 26th of November, 1866, made in the matter and cause hereinafter mentioned, and prove his claims against the assets of the said *J. Clark;* that the costs of the Defendant of this application be costs in the Matter of the Estate of *J. Clark*, and in the cause of *Cumberland* v. *Clark*."

An order was made in *Cumberland* v. *Clark* on further consideration, directing payment of the costs of the executrix in the first place, then payment of the testator's funeral expenses, then payment of the costs of the Plaintiff, and ordering payment of the surplus assets, if any, to a specialty creditor who had come in and proved.

Webber then applied by summons to the Master of the Rolls to have his costs of *Webber* v. *Clark* provided for. The other parties did not oppose his having an order for payment of these costs *pari passu* with those of the Plaintiff, but *Webber* declined to accept this, and the Master of the Rolls thereupon declined to make any order upon the summons.

Webber appealed, and by his notice of appeal motion asked for an order that his costs taxed under the order of the 24th of January, 1867, might be paid forthwith out of the assets of *Jonathan Clark.*

Mr. *Greene*, Q.C., and Mr. *Nugent*, for the Appellant:—

Our costs are the purchase-money of staying our suit. The order is in the form used where the personal representative admits assets, in which case the costs are payable at once: *Seton* on Decrees (1). The executrix ought to pay these costs, and add them to her own: *West* v. *Swinburne* (2).

Mr. *W. W. Cooper*, for the executrix.

Mr. *Fischer*, for the Plaintiff.

SIR C. J. SELWYN, L.J.:—

In my judgment the only order that can be made on this motion is that the Appellant should pay the costs of it. The order of the 24th of January, 1867, directs taxation of the Appellant's costs, and

(1) 3rd Ed. p. 882. (2) 14 Jur. 360.

L. JJ. 1869 *In re* CLARK. CUMBERLAND *v.* CLARK.

payment of them by the executrix out of the assets of the testator. This, I think, cannot mean more than payment of them in a due course of administration, and cannot give the Appellant any right to be paid in priority to the executrix and the Plaintiff. I do not see why the Plaintiff in a suit which is stayed should be in a better position as to his costs than the Plaintiff in a suit which is allowed to go on; still less, why he should have priority over the costs of the personal representative, which are the first charge on the estate. The Appellant, therefore, was offered before the Master of the Rolls all that he was entitled to, and as he thought fit to refuse it, he cannot now be heard to complain that no order was made, and we can do nothing but refuse his present application with costs, without prejudice to any application he may think fit to make to the Master of the Rolls.

SIR G. M. GIFFARD, L.J. :—

This is an appeal from a decision of the Master of the Rolls declining to make any order on the Appellant's application. On the hearing of that application he was offered an order giving him costs *pari passu* with the Plaintiff. This he refused, and as, in our opinion, it was all that he was entitled to, he cannot, after refusing it, come here to ask for anything.

Mr. *W. W. Cooper* suggested that, in order to avoid further proceedings, an order should now be made giving the Appellant such order as to costs as would have been the proper order when the case was before the Master of the Rolls.

Mr. *Fischer* objected to this.

Their Lordships held, that as the Plaintiff objected, no order ought to be made but to dismiss the appeal motion without prejudice to any application to the Master of the Rolls.

Solicitors: Mr. *T. H. Strangways;* Mr. *J. B. Sorrell;* Messrs. *Thomson & Son.*

COCQ *v.* HUNASGERIA COFFEE COMPANY.

L. JJ.
1869
March 18.

Practice—Transfer of Cause—Costs.

Where a party on insufficient grounds refuses to consent to the transfer of a cause from one Court to another, he will be ordered to pay costs if the notice of motion for the transfer asks for costs.

MR. *A. E. MILLER* for the *Hunasgeria Coffee Company*, and several other of the Defendants, moved to have this cause transferred from the Court of Vice-Chancellor *James* to that of the Master of the Rolls, on the ground that Vice-Chancellor *James* had been engaged as Counsel in the cause.

Mr. *Woodroffe*, and Mr. *Locock Webb*, for other parties, consented to the transfer.

Mr. *Fooks*, for the Plaintiff, objected.

Their Lordships made the order, and directed the costs of the applicants and of the consenting parties to be costs in the cause, but gave no costs to the Plaintiff. Their Lordships said they wished it to be understood that where a party on insufficient grounds declined to consent to a transfer, he would be ordered to pay costs if the notice of motion asked for costs, which in the present case it did not.

Solicitors: Messrs. *Courtenay & Croome;* Messrs. *Wilson, Bristowe, & Carpmael.*

L. JJ.
1869
March 18.

CHICHESTER *v.* MARQUIS OF DONEGAL.

Practice—Exceptions—Discovery.

A Defendant cannot excuse himself from answering fully on the ground that the giving the discovery sought would anticipate the decree, such discovery being the same as that which would be ordered at the hearing if the Plaintiff obtained a decree.

Order of *James*, V.C., affirmed.

THIS was an appeal by the Defendant from a decision of Vice-Chancellor *James*, allowing exceptions to his answer.

The bill stated a settlement, dated the 28th of October, 1822, by which certain estates in *Ireland* were settled (after the determination of certain prior uses which had since determined) upon the Defendant for life, with remainder to his first and other sons successively in tail male, with remainder to Lord *Edward Chichester* for life, remainder to his first and other sons successively in tail male, with divers remainders over. The bill further stated a private Act of Parliament, under which part of the settled estates had been sold, and the residue of the purchase-moneys, after discharging certain incumbrances, had been laid out in the purchase of other lands, which were settled to the same uses. The bill then stated a disentailing assurance, dated the 14th of December, 1848, and a resettlement dated the 23rd of July, 1851, by the Defendant and his only son, the Earl of *Belfast*, by which the estates were assured to the use of the Defendant for life, remainder to the Earl of *Belfast* for life, remainder to his first and other sons successively in male tail, remainder to Lord *Edward Chichester* for life, remainder to the Plaintiff (who was the eldest son of Lord *Edward Chichester*) for life, remainder to his first and other sons successively in tail male, with divers remainders over. The bill alleged that this resettlement contained powers enabling the Plaintiff in the events therein mentioned to charge the estate with a jointure for his wife and portions for his younger children. The bill stated that the Earl of *Belfast* had died a bachelor, and that the Plaintiff was desirous of making some provision for his wife and any children he might have, and that he could not do so without having recourse

to his life estate in the settled property, or his powers of jointuring and charging portions; that the Defendant, as first tenant for life, had possession of the title deeds and refused to allow him to inspect them, or to give him any information as to the contents thereof, or as to the particulars of the settled estates. The bill prayed that the Defendant might be ordered to produce to the Plaintiff and his solicitor, the indenture of resettlement, and the other deeds relating to the settled estates, and, if necessary, might be ordered to set forth a full, true, and correct description of the settled property, and to deposit the deeds in Court for convenience of inspection.

By the interrogatories filed for the examination of the Defendant in answer to the bill he was required to set forth the contents of the deed of resettlement, and the particulars of the estates subject to its uses. He was also interrogated as to documents in his possession.

The Defendant, by his answer, did not set out the contents of the deed of resettlement any further than by saying that he was first tenant for life under it, and he declined to state what estates were subject to its uses, or what was the nature of the Plaintiff's interest therein. He further stated that the estates comprised in the resettlement had been mortgaged under powers contained in it, and that the mortgage securities now belonged to the executors of the mortgagee, and that the Defendant had no access to them. In the 15th paragraph, he also stated that some of the title deeds were in possession of his *London* solicitors, Messrs. *Cookson, Wainewright, & Co.*, who held them on behalf of the mortgagees, and the others in the possession of the Defendant's Irish solicitor, who held the same on the behalf of the mortgagees; and that the Defendant had no control over them, or access thereto. In the 16th paragraph he said that there had lately been in the custody of his solicitors divers documents which purported to be copies, abstracts, or extracts of or from the indentures and muniments of title mentioned in the Plaintiff's bill; that such documents were the Defendant's own absolute property; and that since the institution of this suit, he had required his solicitors to deliver up to him such of them as purported to be copies, abstracts, or extracts of or from the indentures of the 14th of December, 1848, and the 23rd of July,

L. JJ. 1869 CHICHESTER v. MARQUIS OF DONEGAL.

1851. He went on to say that he had lately destroyed the last-mentioned documents in order to prevent their inspection by the Plaintiff, and had kept no list of the documents so destroyed, and could not say, as to his belief or otherwise, what the particulars of the same were. He then stated, that he believed that Messrs. *Cookson & Co.* had in their possession certain documents relating more or less to the settled estates, and including copies, abstracts, or extracts of or from the last-mentioned indentures; but that the Defendant did not know the particulars of them, and that the said firm held the documents exclusively on behalf of the mortgagees. In the 17th paragraph he stated his reason for destroying the documents to have been, that he had for years been under a solemn promise not to let the contents of the indenture of the 23rd of July, 1851, become known to the Plaintiff, and that he was desirous, for other reasons, that the Plaintiff should not succeed in this suit.

The Plaintiff took exceptions to the answer, which were allowed. The Defendant appealed as to the exceptions which related to the contents of the resettlement, and the particulars of the estates comprised in it, and also as to the sixth exception, which related to documents in the Defendant's possession.

Mr. *Druce*, Q.C., and Mr. *Cookson*, for the appeal motion, contended that as to the contents of the settlements and the estates comprised in it, the Court would not anticipate the decree by compelling the Defendant to give the very discovery which constituted the whole relief sought by the bill, and which was not necessary for the purpose of obtaining a decree: *Davis* v. *Earl Dysart* (1); *Lingen* v. *Simpson* (2). They urged that the answer as to documents was sufficient.

Mr. *Freeling*, for the Plaintiff, was not called upon.

SIR C. J. SELWYN, L.J.:—

We entertain no doubt that the conclusion at which the learned Vice-Chancellor has arrived is perfectly correct.

So far as the case has been argued by Mr. *Druce*, it depends

(1) 20 Beav. 405. (2) 6 Madd. 290.

entirely upon a question of principle, he not representing that the Defendant has answered fully, but saying that this is an attempt to anticipate the decree, for that the discovery now sought is precisely the same as that which the Plaintiff will obtain in the event of his obtaining a decree at the hearing of the cause, according to the prayer of the bill. Now, in a case where the Defendant has neither demurred nor pleaded, the general rule universally established is, that he must answer fully unless he can bring himself within some exception to that general rule. Certainly, no authority has been cited, and if any authority could have been cited I am sure it would have been by the learned counsel who have argued in support of this appeal, in favour of the proposition that because the discovery which is sought is the same as that which would be obtained if the Plaintiff succeeded in obtaining a decree at the hearing, therefore the Defendant is not to give it. Two cases have been mentioned as tending to support that proposition, but in my view neither of them establishes it. Certainly, the case of *Lingen* v. *Simpson* (1) does not, for there the Vice-Chancellor refused the motion, stating that the Court "made interlocutory orders for production only upon two principles, security pending litigation, and discovery for the purposes of the suit." In my judgment this is discovery for the purposes of the suit, and even assuming that it may be identical with that to be given under the decree ultimately to be obtained, still it is necessary for the purposes of the suit. I think the case of *Davis* v. *Earl Dysart* (2) has still less application. It is true that that case was followed and approved of by His Lordship, the Master of the Rolls, in a subsequent case of *Pennell* v. *Earl Dysart* (3), but I do not think it is an authority in support of any such proposition as is now advanced, and that is made quite clear by the observations of the Master of the Rolls himself in the case of *Lady Beresford* v. *Driver* (4). A perusal of those three cases would convince any one that it was not the intention of His Lordship to introduce any new rule, or to establish any such practice as has been contended for here. Therefore, so far as the matter of principle is concerned, I think the Vice-Chancellor was correct in allowing these exceptions.

(1) 6 Madd. 290.
(2) 20 Beav. 405.
(3) 27 Beav. 542.
(4) 14 Ibid. 387.

L. JJ.
1869
CHICHESTER
v.
MARQUIS OF
DONEGAL.

Then Mr. *Cookson* has argued another point, namely, that the interrogatory as to documents in the Defendant's possession has been fully answered. But, looking at the admissions contained in the 16th and 17th paragraphs of the answer, and considering the admission as to the destruction of the documents, and the taking possession of those documents which the Defendant has destroyed, and the possession of certain other documents by those gentlemen who are his solicitors, I entirely agree with the Vice-Chancellor that that interrogatory has not been sufficiently answered. The appeal motion, therefore, will be refused with costs.

SIR G. M. GIFFARD, L.J.:—

In this case the Defendant has neither pleaded nor demurred, but it has been argued that a sufficient reason for refusing the discovery is, that it is an anticipation of the decree. I cannot see why that should be any reason for refusing the discovery, and no case has been cited which supports the view that it is. *Lingen* v. *Simpson* (1) was a very different case, because it related to the production of a reference book, and the reference book was the only thing that was to be produced at the hearing, and had nothing to do with the suit antecedently to the hearing, and as a matter of discretion (which I think may be exercised in many of these cases) there might be many and weighty reasons why that reference book should not be ordered to be produced, one being that the Plaintiff would have thereby got a great portion of the custom of the Defendant. But in this case, in point of discretion, I certainly can see no reason why the Plaintiff should not be told what the property is to which he is entitled, and if I had any doubt on the question of discretion the 16th paragraph of the answer would make an end of all doubt. Again, when the Defendant tells us he is under a promise not to give the information, that is a reason why he should be compelled to give it, for, unquestionably, a promise by a person having the custody of title deeds not to tell a person entitled under them what the property is, shews that there is need for the Court to compel discovery. Therefore I think

(1) 6 Madd. 290.

these exceptions must be allowed as far as the question of principle is concerned, and I agree that the interrogatory to which the sixth exception relates has not been sufficiently answered.

L. JJ. 1869 CHICHESTER v. MARQUIS OF DONEGAL.

Solicitors: Mr. *Appleyard*; Messrs. *Cookson, Wainewright, & Co.*

In re SMITH, KNIGHT, & CO.

L. JJ. 1869 *March* 18.

Companies Act, 1862, *s.* 115—*Production of Books.*

Shares in a company now in course of winding up had been transferred from *C.* to *N.* without consideration, *G.* being the active party in the transaction, and the subsequent calls had been paid with moneys supplied by *G.* The liquidators, considering it material to trace these moneys, applied for a summons calling upon the secretary of the banking company with whom *G.* kept his account, to attend for examination, and produce all books containing entries as to *G.*'s affairs. The Master of the Rolls was not inclined to issue the summons, but desired the point to be brought before the Lords Justices:—

Held, that the summons might issue, it being left open to the witness, upon his attending the summons, to take any objections he might have to the inspection of the books.

THIS was an application to issue a summons under sect. 115 of the *Companies Act*, 1862, and was brought before the Lords Justices by the desire of the Master of the Rolls.

On the 18th of February, 1869, in the course of the winding up of *Smith, Knight, & Co., Limited, Edward Noble*, a contributory, was cross-examined on behalf of the liquidators as to the circumstances relating to the transfer into his name, on the 8th of September, 1864, of 250 shares in the company by *Charles Capper*, one of the directors. *Noble*, in the course of his cross-examination, stated that he had paid no consideration for these shares; that he had had no communication with *Capper* about them; that a person named *Gordon*, who attested *Noble's* execution, had asked him to accept the transfer; that he had paid £1,200 for calls on the shares, but not out of his own moneys, *Gordon* having supplied him with money for the payments; that *Gordon's* bankers were the *East London Bank*; that *Capper* was deputy-chairman of that

L. JJ. 1869 — *In re* SMITH, KNIGHT, & Co. —

bank; and that *Gordon* was out of *England*, and not expected to return.

The clerk of the liquidators, by his affidavit in support of the application for the summons, deposed to the above effect, and proceeded to say that he verily believed it to be important for the liquidators to obtain further information in regard to the banking account of *Gordon*, and for that purpose to examine the secretary of the bank upon the production of the bank books containing the entries relating to *Gordon's* account with the bank, and that the deponent also believed that it would be necessary to examine *Capper* in regard to the transaction.

The liquidators accordingly applied at the Chambers of the Master of the Rolls, to whose Court the winding-up was attached, for the issue under the *Companies Act*, 1862, s. 115, of a summons in the following form upon the secretary of the *Central Bank of London, Limited*, which had succeeded to the business of the *East London Bank*:—

"*H. Daniell*, of, &c., secretary to the *Central Bank of London, Limited*, is hereby summoned to attend at the Chambers of the Master of the Rolls in , on the day of , 1869, at o'clock in the noon, to be examined on the part of the liquidators of the said company for the purpose of proceedings directed by the Master of the Rolls to be taken before me in the above matter; and the said *H. Daniell* is hereby required to bring with him, and produce at the time and place aforesaid, all cash books, day books, original ledgers, and every other book of the *East London Bank, Limited*, in his possession, custody, or power, or in the possession, custody, or power of the said banks, or either of them, containing any entry or entries of loans, advances, or discounts, payments in or out of the said banks, to the debit or credit of *J. H. Gordon*, formerly of, &c., for the years 1864, 1865, and 1866. Dated this 25th day of February, 1869.

"—— ——, Chief Clerk."

The Chief Clerk, considering that he had not authority to issue such a summons, an application was made to the Master of the Rolls in Court. His Lordship expressed an opinion adverse to the application, but desired that the case might be brought before the

L. JJ. 1869 *In re* SMITH, KNIGHT, & Co.

Lords Justices. Their Lordships, on its being mentioned to them, directed it to be put into the paper of appeal motions without requiring any order of the Master of the Rolls to be drawn up.

Sir *R. Baggallay*, Q.C., and Mr. *Westlake*, for the application, which was *ex parte*, stated that the object was to endeavour to trace the moneys which had been supplied by *Gordon* for payment of the calls.

SIR C. J. SELWYN, L.J.:—

It appears to me that the proposed summons may properly be issued; but I say nothing to fetter the judgment of the Master of the Rolls as to any objection which the party summoned, when he attends for examination, may make as to the inspection of the books, and it is left quite open to the witness to make any such objection.

SIR G. M. GIFFARD, L.J.:—

I am of the same opinion. It appears to me that, under the 115th section, the person summoned is in the same position as an ordinary witness served with a *subpœna duces tecum*.

Solicitors: Messrs. *Ashurst, Morris, & Co.*

In re GENERAL ROLLING STOCK COMPANY. *Ex parte* ALLIANCE BANK.

L. JJ. 1869 *April* 16, 17.

Securities to meet Bills of Exchange—Double Insolvency—Claims of Bill holders—Ex parte Waring.

M. borrowed money from the *R.* company, for which he accepted and gave to them bills of exchange, and deposited shares as a collateral security. When the bills became due *M.* wished the loan continued, and the managing director of the *R.* company sent him for acceptance fresh bills, with a letter stating them to be in place of those falling due. *M.* accepted the new set of bills on that footing. After this *M.* died insolvent, and the *R.* company was ordered to be wound up, and was admitted to be utterly insolvent. Both sets of bills had been negotiated, and were outstanding. The holders of the

L. JJ.

1869

In re GENERAL ROLLING STOCK COMPANY.

Ex parte ALLIANCE BANK.

first set of bills applied to have such first set paid by means of the deposited shares, on the principle of *Ex parte Waring* (1).

Held, by the Master of the Rolls, that the bill holders could not maintain any claim against the shares deposited.

Held, on appeal, that *Ex parte Waring* did not apply in favour of the holders of the first set of bills, for that the *R.* company after receiving the new bills in place of the old ones, were bound to indemnify *M.* against the old ones, and had no right to apply his shares in payment of them; but whether the principle of *Ex parte Waring* was not applicable in favour of the holders of the new bills, *quære*.

Ex 17, 20

THIS was an appeal by the *Alliance Bank* from a decision of the Master of the Rolls, refusing their application to have certain railway shares applied towards payment of bills held by them.

On the 13th of March, 1863, a written agreement was entered into between *T. L. Murray* and the *General Rolling Stock Company, Limited*, that the company should advance to *Murray* £12,000 for nine months at £6 per cent. per annum, for which *Murray* at the end of the nine months was further to pay a bonus of £2000. It was further agreed that *Murray* should give his acceptance at nine months for the £12,000, and £2000 bonus, and deposit with the company as collateral security for payment of those sums £12,000 worth of *Turin and Savona Railway* shares, and a certain amount of Belgian railway shares. The agreement contained a further stipulation relating to a supply of rails to the *Turin and Savona Railway*, under which *Murray* became liable for payment of a further sum to the *Rolling Stock Company*.

On the 16th of December, 1863, another written agreement was entered into between *Murray* and the *Rolling Stock Company*, by which it was agreed that the loan should be continued for the further term of three months, and renewed for three months further at the expiration of that term. It was further provided that the agreement as to rails should be cancelled, and that *Murray* should give his acceptances for the further bonus of £3000, and also, in consideration of the renewal of the loan, his acceptances for £1500, and that he should increase the number of *Turin and Savona* shares deposited.

In June, 1864, an arrangement was come to between *Murray* and the company, that the loan should be renewed for six months,

(1) 19 Ves. 345.

which was to be done by *Murray's* giving acceptances for three months, which were to be renewed at the end of that time for another three months. The moneys having, by means of another bonus, been made up to £21,000, *Murray*, in June, 1864, gave to the *Rolling Stock Company* his acceptances for £21,000 falling due on the 12th of September, 1864, and the deposit of shares was continued as a collateral security. These acceptances were, for convenience, designated in argument as the fourth set.

On the 8th of September, 1864, the managing director of the *Rolling Stock Company* wrote to *Murray* as follows:—

"I beg to inclose you drafts for your acceptance for £21,000 in place of those falling due on Monday next, the 12th instant, and at the same time urge upon you the necessity to duly accept and return them per return of post."

Murray duly accepted and returned these bills, which were designated as the fifth set, sending them in a letter which simply stated that they were sent in compliance with the letter of the 8th of September.

The *Rolling Stock Company* had, before September, 1864, negociated the fourth set of bills, and the *Alliance Bank* were the holders of them to the extent of £16,000. The *Rolling Stock Company* did not take up those held by the *Alliance Bank*, though they took up the remainder.

The *Alliance Bank* sued *Murray* on the bills they held, and in 1866 recovered judgment. *Murray* died insolvent in 1867, without having paid the bills.

The *Rolling Stock Company* negotiated the fifth set of bills to the extent of £16,000.

The *Rolling Stock Company* was now in course of winding up, and it was admitted that its debts would not nearly be paid in full.

The shares in the *Turin and Savona Railway Company*, which had been deposited by *Murray* with the *Rolling Stock Company* in pursuance of the above-mentioned agreement, came into the possession of the official liquidator, and the *Alliance Bank* took out a summons to have the proceeds of them applied in payment of the £16,000 bills of the fourth set, of which the *Alliance Bank* were the holders.

L. JJ.

1869

In re GENERAL ROLLING STOCK COMPANY. *Ex parte* ALLIANCE BANK.

The Master of the Rolls refused the application (1).

Sir *R. Baggallay*, Q.C., and Mr. *Eddis*, for the *Alliance Bank*, in support of the appeal motion, contended that the case was

(1) LORD ROMILLY, M.R. :—

I think that this case, when the facts are well understood, is perfectly clear. I am of opinion that *Ex parte Waring* (19 Ves. 345) in one sense does apply; but that in another sense it does not. It does not apply in the sense of giving any security whatever to the holders of the bills. If one person advances a sum of money to another upon a mortgage of his estate, or upon a deposit of railway shares, or the like, he takes that mortgage as a security for the sum of money which he advances. He may also take a judgment, a bill, or any other collateral securities, and those are securities for the money which is advanced. But when a security is given for a bill, no money passes at all between the parties. The mortgage, in point of fact, is given as a security that the person who gets the money upon the bill that is drawn will meet the bill at maturity; and if he does so, and properly retires the bill at maturity, then the security is over. That was the case which existed in *Ex parte Waring* (19 Ves. 345) and *Powles* v. *Hargreaves* (3 D. M. & G. 430); and, in fact, that is the state of circumstances in which the equity administered in those cases has usually arisen. When I said that *Ex parte Waring* in one sense applies, I meant that the principle upon which Lord *Eldon* there acted applies, that when there are two insolvent estates it is the duty of the Court to settle the equities between the two estates, and to arrange what the equities are; of which arrangement the bill holders undoubtedly get the advantage.

Now, in the present case, the company advance £12,000 to *Murray* upon certain conditions, which make the debt ultimately amount to £21,000. As security for that debt he deposits a certain number of shares in an Italian railway, and as an additional security for it, he gives bills for £21,000. Then, as between *Murray* and the company, *Murray* owes the company £21,000, and has given bills to that amount; and he has also given a mortgage security for the same amount. When the bills become due, it is arranged that they shall be renewed. *Murray* thereupon renews the bills, giving new bills to the amount of £21,000 to meet the bills that are in circulation. The company, instead of taking up all those bills, in point of fact leave £16,000 of them outstanding, and discount the new bills to the extent of £16,000, retaining the rest; the consequence of which is, that there are bills of *Murray* in the hands of the company, or outstanding, to the amount of £37,000, to secure £21,000 of debt, in addition to which the company have the deposit of railway shares. If both *Murray* and the company were solvent, the matter would be very simple. *Murray* pays the £21,000, he gets back his securities, and, in addition to that, he compels the company either to take up or to pay him the old outstanding bills; and that, in point of fact, is the equity now existing between the two estates. If the two estates were solvent, the £32,000 being proved against *Murray's* estate by the bill holders, *Murray's* representative, upon paying the £16,000 on the outstanding new bills, and the £5000 on the bills remaining in the hands of the company, would be entitled to have the deposits and the bills

W.N. 17 Jan 1869.

governed by *Ex parte Waring* (1), the principle of which was not confined to cases where the drawer and acceptor were bankrupt: *Powles* v. *Hargreaves* (2).

Mr. *Jessel*, Q.C., and Mr. *Winterbotham*, for holders of bills of the fifth set:—

The shares were deposited as security to the *Rolling Stock Company* against the fourth set of bills, but that gave the bill holders no lien on them. The *Rolling Stock Company* and *Murray*, while both were solvent, could do what they pleased with the shares, and the letter of the 8th of September, 1864, shews that the shares were made a security for the fifth set of bills. We say, therefore, that we are entitled on the principle of *Ex parte Waring*. This point is not regularly before the Court; but even if the Court declines to express any opinion, the case must be decided against the *Alliance Bank*, since, after the letter of the 8th of September, the *Rolling Stock Company* had no right to apply the shares towards the fourth set of bills, being bound by that letter to take up the fourth set. [They referred to *Trimingham* v. *Maud* (3).]

Mr. *Wickens*, Mr. *Davey*, and Mr. *Lawrance*, for other holders of bills of the fifth set.

Mr. *Roxburgh*, Q.C., for *Murray's* representatives:—

It is immaterial to us whether the shares are applied to the fourth or fifth set of bills, for we are liable at law on both. We only contend that the shares must be applied towards the fourth and fifth

---

remaining in the hands of the company returned from the company, and also to say that the £16,000 old bills, upon which *Murray* was liable as acceptor, should be paid by the company; and, in point of fact, those equities must, in my opinion, be set right now between the two estates, upon the principle of *Ex parte Waring*, in taking the accounts between the two estates. But that does not give the holder of any of the bills any right against the security. It is, in point of fact, only an affair between the two estates, and must be regulated wholly regardless of the persons who are the holders of the bills, who may, undoubtedly, get the advantage of one estate being made a little larger, or the disadvantage of the other estate being made a little less.

In my opinion, therefore, the claim altogether fails, and the summons must be dismissed.

(1) 19 Ves. 345.
(2) 3 D. M. & G. 430.
(3) Law Rep. 7 Eq. 201.

L. JJ. 1869

In re GENERAL ROLLING STOCK COMPANY. *Ex parte* ALLIANCE BANK.

sets of bills, or some of them, so as to relieve our estate, and not treated as part of the assets of the *Rolling Stock Company*.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the official liquidator of the *Rolling Stock Company*:—

Ex parte Waring (1) does not apply where there is neither bankruptcy nor anything analogous to it: *Laycock* v. *Johnson* (2). In *Powles* v. *Hargreaves* (3) the creditors' deed provided for administration as in bankruptcy. This is a case of a loan on the security of bills and the collateral security of shares, and *Ex parte Waring* does not apply to such a case: *Loder's Case* (4); *Inman* v. *Clare* (5); *Ex parte Stephens* (6).

Sir *R. Baggallay*, in reply.

SIR C. J. SELWYN, L.J.:—

The Master of the Rolls, in his judgment in this case, has not questioned the authority of the case of *Ex parte Waring*, but, on the contrary, has referred to it as still governing all cases falling within the scope of its authority; and it certainly was not the intention of the Lord Chancellor and myself, in *Ex parte Stephens*, to question in any way its authority. But the principle upon which *Ex parte Waring* depends appears very clearly from the judgment of Lord *Eldon*. He says (7): "If these bill holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses rather than by any demand directly in their own right upon any fund in the hands of *Brickwood & Co.*" In the same spirit he says (8): "Having regard to the demands of all the creditors and the bankrupts in this circuitous way, I think the bill holders must be paid, not as having a demand upon these funds in respect of the acceptances they hold, but as the estate of *Brickwood & Co.* must be cleared of the demand by their acceptances, and the surplus, after answering that demand, must be made good to *Bracken & Co.*"

In such cases, then, the claims of the bill holders depend not

(1) 19 Ves. 345.
(2) 6 Hare, 199.
(3) 3 D. M. & G. 430.
(4) Law Rep. 6 Eq. 491.
(5) Joh. 769.
(6) Law Rep. 3 Ch. 753.
(7) 19 Ves. 349.
(8) Ibid. 350.

upon any contract to which they are parties; for in the case of *Ex parte Waring* (1), as in this case, the bill holders had not even any notice of the existence of the securities the benefit of which they claimed; the right in these cases depends upon the accidental concurrence of circumstances giving rise to such a complication as can only be solved by one particular application of the securities, or the proceeds of the securities. In order to give rise to such a state of things, there must be two insolvent estates, and there must be, to the extent pointed out in *Powles* v. *Hargreaves* (2), a forced administration of both these estates.

Until that state of circumstances has arisen, the two persons who are the parties to the contract have a perfect right to deal with the securities which one of them has deposited with the other in any manner they think fit. That is the point intended to be decided, and is, I think, decided, by what fell from the present Lord Chancellor in the case of *Ex parte Stephens*, when he says (3): "The bill holder might have raised an equity, but even then he could not raise it till he had given the persons who gave the guarantee notice of his claim, and until that time they might deal with all the rights as between them and the acceptors in any way they thought fit." Applying, then, those principles, which I think are clearly established, to the facts of the present case, we find, in the first place, that there was here a contract between Mr. *Murray* and the *Rolling Stock Company* originally for the loan of £12,000, with a bonus of £2000, and which, by means of the sum of £3000, which has been called a fine, and also by reason of two subsequent bonuses, one of £1500 and one of £2500, became ultimately raised to the sum of £21,000, which was the sum secured by the fourth and fifth sets of bills.

Under the original contract of the 13th of March, 1863, there was a loan of £12,000, with the addition of the bonus of £2000, and in respect of that Mr. *Murray* agreed to give his acceptances at nine months from the date of this agreement, and to deposit with the company, as collateral security for the £12,000 and the £2000 bonus, certain railway shares and other property. That was a contract by which the shares were given as a collateral

(1) 19 Ves. 345. (2) 3 D. M. & G. 430.
(3) Law Rep. 3 Ch. 757.

L. JJ. 1869

In re General Rolling Stock Company. *Ex parte* Alliance Bank.

security for the loan which was primarily secured by the acceptances. It is unnecessary to go through the details of the subsequent continuance of that loan, and the transactions in respect of which the two subsequent bonuses were agreed to be given; but applying the principle which was laid down in *Ex parte Stephens* (1), it is clear that it was open to Mr. *Murray* and to the *Rolling Stock Company*, the parties to that contract, at any time to deal with the securities, which were part of the subject matter of the contract, in any manner they might think fit. The question we have now to decide is, whether they have so dealt with the securities as to constitute, at the date of the insolvencies, a state of circumstances which can support a claim such as that which has been raised in the present case.

This question depends upon the construction which is to be put upon the transaction of the 8th of September, 1864. [His Lordship read the letter of the 8th of September.] That letter contains a plain statement that the bills, the particulars of which are stated in the same letter, and which amount to £21,000, were to be accepted by Mr. *Murray* in place of those falling due on the 12th of September. The parties being at that time fully entitled to deal with the securities in any manner they thought fit, and without regard to any interest existing in any bill holder, entered into an arrangement, the substance of which appears to me to be clearly this, that Mr. *Murray* was to accept, as he did accept, the fifth set of bills for £21,000, and that they were to be in place of the fourth set of bills. The *Rolling Stock Company*, after entering into this arrangement, could not possibly have a right to say that they would retain the securities as security for the fourth set of bills, for it is obvious that the faith and honour of this transaction was that they should in some way or other put an end to any liability on *Murray's* part in respect of those bills. Suppose the contract contained in that letter had been reduced into plain terms instead of being expressed in that short form, there would then have been a formal agreement between the parties that the fourth set of bills should be cancelled, and should be delivered over in the cancelled state to Mr. *Murray*. In that case clearly it could not have been said that the security was a continuing security in respect of the

(1) Law Rep. 3 Ch. 753.

bills so agreed to be cancelled, nor, in my opinion, could it have been said that because Mr. *Murray* had subsequently failed to pay the fifth set of bills for £21,000, or had made default in any other manner, any right in respect of the fourth set of bills was revived. Now the Appellants in this case are persons holding some of this fourth set of bills; but, as I have already said, the security in respect of the fourth set of bills was entirely put an end to by the transaction between Mr. *Murray* and the *Rolling Stock Company* at a time when the parties were fully at liberty to deal with the securities as they thought fit, and consequently when, upon the subsequent insolvency of the *Rolling Stock Company*, and the subsequent insolvency of Mr. *Murray*, those bills became dishonoured, and still remained outstanding in the hands of the *Alliance Bank;* the *Alliance Bank* are not able to shew the existence of that state of circumstances with respect to the securities which alone could bring them within the principle of the decision in *Ex parte Waring* (1).

I think, therefore, in this case the Master of the Rolls was quite right in refusing the claim of the *Alliance Bank*. That is the only point which is now before us, and I think it would be very dangerous to go further in this case, especially having regard to the manner in which these winding-up proceedings are necessarily carried on. I wish, therefore, to be understood as deciding the case of the *Alliance Bank*, and nothing more. I think the claim has been rightly refused by the Master of the Rolls, and consequently this appeal motion must be refused with costs.

SIR G. M. GIFFARD, L.J.:—

The order of the Master of the Rolls must be affirmed in this case, although I confess I cannot accede to the reasons which led his Lordship to the conclusion at which he arrived. The simple ground on which I found the affirmance of that decision is this, that the *Alliance Bank* ought not to be paid out of the proceeds of this security, because, as between the two estates, there is, under the circumstances, no contract authorizing the application of the proceeds of these securities in payment of the bills which the *Alliance Bank* holds. Now, I certainly have no hesitation in saying that *Ex parte Waring* and *Powles* v. *Hargreaves* (2) apply to such

(1) 19 Ves. 345.

(2) 3 D. M. & G. 430.

L. JJ. 1869 — *In re* General Rolling Stock Company. *Ex parte* Alliance Bank.

insolvencies as exist in this case, as between the insolvent estate which is being wound up and the insolvent estate of the deceased testator, the personal representative appearing here, admitting insolvency, and submitting to be bound. I probably should have thought that the decision of the Master of the Rolls could not stand if matters had rested entirely upon the state of things as they existed when the fourth set of bills were drawn; but that is not so. There has been since that the letter of the 8th of September, 1864. In my opinion that letter created an entirely new contract. After that letter the state of facts was such that, as between Mr. *Murray* and the *Rolling Stock Company*, the *Rolling Stock Company* had no right to apply these securities otherwise than in payment of the bills which were drawn and accepted on the footing of that letter. I consider that to be the only contract which affects the deposit. It was entered into at a time when these parties were both in a position to enter into any contract they might think fit without any regard to the bill holders, and I am of opinion that it excludes the *Alliance Bank*.

For these reasons this appeal must be dismissed with costs.

Solicitors: Messrs. *Flux, Argles, & Rawlins;* Messrs. *Mackenzie, Trinder, & Co.;* Mr. *Clements;* Messrs. *Davidson, Carr, & Bannister.*

CHARLTON *v.* EARL OF DURHAM.

L. C.
1869
March 17.

Payment to one Executor—Executor or Trustee—Breach of Trust—Notice.

A testator gave the residue of his estate to his two executors upon certain trusts. Part of his estate consisted of a bond given by the trustees of a minor who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly, in the place of the bond given by the trustees.

Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, and gave a receipt purporting to be signed by both the obligees, but, in fact, signed by one only, the signature of the other being a forgery.

In a suit by the other executor and *cestuis que trust* under the will against the obligor:—

Held, that though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor as the obligees were executors:

Held, that under the circumstances the acceptance of a bond from the obligor in the place of the bond from his trustees was not a breach of trust by the executors.

Debtors to the estate of a testator will not, merely on account of the lapse of time, be held to have notice of the fact that all the debts are paid, and that the executors have become trustees.

THIS was a suit for the purpose of rendering the Earl of *Durham* liable for a loss of £2500 occasioned by the fraud of one *Wilson*, who had received payment of the money, which was secured by a bond to himself and *Edward Charlton*, and, forging the name of *Charlton*, had given what purported to be a joint receipt by both of them.

In 1846 the trustees of the *Durham* estates borrowed £5000 from the testator, *Thomas Glaholm*, for the purposes of the trust, upon the security of their bond. *Thomas Glaholm* died in January, 1849, having, by his will, dated the 22nd of November, 1847, appointed *James Wilson* and *Edward Charlton* his executors, and empowered them to continue any portion of his estate and effects in and upon the security upon which the same might be invested at the time of his death. The residue was given to the executors upon certain trusts; one of which was to pay his widow an annuity of £100 a year, and, subject thereto, upon trusts for the benefit of his family.

L. C. 1869 CHARLTON v. EARL OF DURHAM.

The will was not proved until the 10th of December, 1849.

On the Earl of *Durham* coming of age, in September, 1849, it was arranged between Mr. *Philipson* (the solicitor of the testator, and afterwards of the executors) and Mr. *Morton*, the agent of the Earl's property, that the Earl's bond for the £5000 should be given in lieu of the then subsisting bond of the Earl's trustees. A bond was accordingly prepared by *Philipson*, who was alone employed in the matter, and had since acted for the Earl, but not as his general solicitor, though solicitor for him in the present suit. It was dated the 10th of June, 1849, but was not executed until after the 5th of September, 1849; the exact day of execution was not known, but was probably before the 10th of December. By this bond the Earl became bound to *James Wilson* and *Edward Charlton*, therein described as "executors of the last will and testament of *Thomas Glaholm*, deceased" in the penal sum of £10,000, with a condition making the same void on payment by the Earl, his heirs, executors, or administrators, to the said *J. Wilson* and *E. Charlton*, their executors, administrators, or assigns, of the sum of £5000 with interest on the 10th day of December then next. In 1859 the Earl, through *Philipson*, paid off £2500, part of the £5000, for which he got a receipt, signed by *James Wilson* and by *Edward Charlton*, "executors of the late *Thomas Glaholm*."

In February, 1862, an application for repayment of the remaining £2500 was made to the Earl's agent, *Morton*, by *Wilson*, "for self and co-executor of the late *Thomas Glaholm*." *Morton* made no communication to *Charlton* or *Philipson*, but on the 2nd of June, 1862, he sent a cheque for the amount due to *Wilson*, who was a clerk in a bank at *Newcastle* where the bond was deposited, and had been in the habit, as acting executor, of receiving the interest and giving receipts "for self and co-executor." *Wilson* wrote acknowledging the receipt of the cheque, "in payment of Lord *Durham's* bond to *Glaholm's* executors, and interest, less income tax, up to this day," and inclosed the bond with the following receipt indorsed upon it:—

"*Newcastle*, 3rd June, 1862.

"Received of the Right Hon. the Earl of *Durham* the sum of

twenty-five hundred pounds, in full of the within-named bond, together with all interest up to this day.

"*James Wilson,* "*Edward Charlton,* } Executors of the late *Thomas Glaholm.*"

£2500
51 18 4 Int. less tax.

£2551 18 4"

The signature of *James Wilson* to this receipt was genuine, but that of *Edward Charlton* was forged by *James Wilson,* who embezzled the £2500.

Under these circumstances the bill was filed by *Charlton* and the persons beneficially interested under the will of *Glaholm,* praying a declaration that the payment by *Morton* to *Wilson* was inoperative and void as against the Plaintiffs, and that the receipt signed by *Wilson,* and retained by the Earl, was a fraud on the Plaintiffs, and might be delivered up to the Plaintiffs to be cancelled, and praying that Lord *Durham* might be ordered to pay to the trustees of *Glaholm's* will, upon and for the trusts and purposes of the said will now subsisting or capable of effect, the sum of £2500; or, at the option of the Plaintiffs, to execute and deliver to the trustees a new bond for securing that sum.

It appeared that all the testator's debts had been paid, and the residue of his estate ascertained, long before the year 1862.

By his answer, the Earl denied any knowledge that the money secured by the bond was trust money, and submitted that he ought not in any event to be affected by any supposed knowledge or information, or means of knowledge, possessed by *Philipson*; that he had no knowledge, and he believed his agent, *Morton,* had none, of or as to the trusts of *Glaholm's* will, or the state of his estate when the remaining £2500 was called in and paid, and that neither he nor his agent were bound, or even entitled, to make any inquiry in reference thereto. He also insisted that in all dealings relating to the bond *Charlton* and *Wilson* always acted and were treated as executors of *Glaholm,* and in no other character, and that, by reason of the payments made, and the delivery up to him of the bond, such bond was wholly and effectually discharged and satisfied, as well in equity as at law.

L. C. 1869

CHARLTON v. EARL OF DURHAM.

The suit was heard before the Vice-Chancellor *James*, who, on the 22nd of January, 1869, dismissed the bill with costs (1).

(1) Jan. 22. SIR W. M. JAMES, V.C., after stating the facts of the case and the object of the suit, continued:—

The Earl of *Durham's* answer is very simple; he says, "I dealt with the executors; I had a right to deal with the executors; and I paid one of the executors as by law I might; I got the security back from him; I am legally discharged from that debt which I have legally satisfied." The Plaintiffs say, "That may be a good answer at law, but in equity you are still liable to pay that debt, notwithstanding you have obtained a good legal discharge for it." In the first place it was suggested, true it is that you are now setting up this case of your having paid to one on the receipt of the one, but that is not what you intended to do; you intended to pay to the two, and on the receipt of the two, and as you have not got the receipt of the two, you are not at liberty to set up the receipt of the one as a sufficient discharge. One does not know what to say to such a contention, for if a man has got the receipt of one he is entitled to rely upon it. It was then said: you had notice through your solicitor that this was residuary trust estate. Your solicitor—that is, the solicitor whom you employed in the matter of that bond, and who charged you for preparing, as far as it may be called preparing, that money bond—knew all about the will, and therefore you had constructive notice through him of the trusts upon which the money was held. I certainly shall not be the first Judge to lay down that which I do not find has ever been laid down, viz., that an obligor who goes to the solicitor of the intending obligees, and pays that solicitor his charges for filling up a money bond, has constructive notice through that solicitor that the obligees are trustees, and notice of the trusts upon which those trustees hold the money which is secured by the bond. But, in truth, the solicitor himself had no notice, and could have had no notice at that time, that this was residuary trust estate, for the transaction took place very shortly after the death of the testator, and before the will was proved, and therefore before anything substantial could have been done in the administration of the estate, or in ascertaining what was the residue. In fact, it was not residuary estate at that time.

Then, it is said, you ought to have presumed, and must be taken to have known, from the lapse of time which occurred between the death of the testator and the ultimate transaction in paying off the £2500, that this money had ceased to be assets and had become residuary or trust estate. There is no authority that I know of for that proposition. There are conclusive authorities, as it seems to me, to the contrary, in those cases in which it has been held that even a purchaser cannot suggest such a presumption as a reason why he should not be compelled specifically to perform a contract for the purchase of leaseholds from an executor after the lapse of many (in one case of twenty-seven) years. It was also suggested that the transaction itself involved a breach of trust, which imposed upon the Earl a liability distinct from that which he undertook in terms by his bond. They say the substitution of the bond of the Earl for the bond of his trustees was a breach of trust on the part of the executors, and that the Earl was a party to that breach of trust; and that the transaction must be considered exactly as if his trustees had

The Plaintiffs appealed.

Mr. *Kay*, Q.C., and Mr. *Haddan*, for the Appellants:—

The executors had no right to treat this as a permanent debt and to advance the money to the Earl of *Durham*, for that was what, in fact, took place. He was cognizant of this breach of trust, and ought to have had the receipt of the *cestuis que trust*. *Webb* v. *Ledsam* (1) was not so strong a case. Besides this, the estate of *Glaholm* was all administered and the debts paid, and the executors had become trustees, so that the receipt of both was necessary. The length of time alone was sufficient notice of these facts to the Earl of *Durham*, and he, very properly, intended to have the receipt of both; he cannot now turn round and say that the receipt

---

paid so much money to the executors, and then that he had borrowed that money on his own bond, that not being a proper investment of the moneys of the testator. I do not know that there is any authority for that. It is possible, no doubt, that if executors will take the bond of one instead of the bond of two they may themselves, in certain events and contingencies, become liable as for a *devastavit*; but it does not follow from that that the person who gives his bond simply in the character of an obligor incurs any obligation in respect of the money other than that which is expressed upon the face of the instrument itself. I am of opinion, therefore, in this case, that the Earl never was liable except as a legal debtor upon a legal instrument to obligees, any one of whom had a right legally to receive the money which he was bound to pay, and that having paid he is effectually discharged in this Court as well as in a Court of Law. But, even assuming that the transaction had produced the effect which is suggested, that this was trust money, and that the Earl was paying trust money intending to pay it to two trustees, I am not prepared to hold that a person not privy to any breach of trust who has legally obtained a discharge from a legal debt can be made liable in this Court when he has behaved with perfect honesty, and has taken all the ordinary precautions which a man in the ordinary course of business would take. The Court has gone, I think, in many cases to the very verge of justice, and to the very verge of its legitimate jurisdiction, in helping *cestuis que trust* out of the money of persons who have dealt honestly but incautiously with trustees, and I certainly will not extend that jurisdiction one degree beyond what I find in the decided cases, or what I am directed by the Court of Appeal to do.

The bill must therefore be dismissed, and dismissed with costs. The only reason why I reserved my judgment was, that the case being one of great hardship, so far as the Plaintiffs are concerned, I wished to see if I could find any reasonable ground for relieving them from paying the costs of the suit. I have been unable to find any such ground, and therefore the costs must abide the result.

(1) 1 K. & J. 385; 1 Jur. N.S. 775

L. C. 1869 CHARLTON v. EARL OF DURHAM.

of one is enough. If the bond had been returned with only *Wilson's* receipt, the Earl of *Durham's* agent would not have accepted it as sufficient, He ought to have taken the proper precautions, and to have seen that the money reached the hands of both; and *Cowell* v. *Gatcombe* (1), *Eaves* v. *Hickson* (2), and *Boursot* v. *Savage* (3), are authorities on the effect of payment to executors. If there had been trustees appointed by the will as well as executors, this money would have been already handed over to the trustees; as it was, the executors became the trustees: *Phillipo* v. *Munnings* (4). Executors who take a bond must sue on it themselves, and not as executors: *Hosier* v. *Arundell* (5); *Williams* on Executors (6); and in that case, one obligee cannot give a receipt in this Court. If executors lend on personal security they do it at their own risk and not as executors. When the first £2500 was paid all the proper precautions were taken, and if, when the second payment was made, the Earl's agent had communicated with *Charlton* or *Philipson*, the money would not have been lost; as it is, the loss ought to fall on the person who neglected to take the proper precautions.

Mr. *Druce*, Q.C., and Mr. *Chitty*, for the Earl of *Durham*, were not called upon.

LORD HATHERLEY, L.C.:—

The only arguable point seems to arise from the substitution of the Earl of *Durham* for his trustees. Suppose the original debtors had remained such, and that these transactions had taken place with them instead of with the Earl, then there is no authority for holding that merely because the debt was not called in for some time, we are to imply that the debtors knew that the executors had ceased to be executors and had become trustees. A debtor who has been paying interest for perhaps twenty years, does not, therefore become cognizant of the fact of all the testator's estate having been administered and of the executors having become trustees.

The persons with whom the executors are dealing are not bound

(1) 27 Beav. 568.
(2) 30 Ibid. 136.
(3) Law Rep. 2 Eq. 134.
(4) 2 My & Cr. 309.
(5) 3 B. & P. 11.
(6) Page 826, 6th Ed.

to know the state of the testator's assets, and it may be many years before all his debts are paid, and his estate wound up. There are good reasons why the receipt of one executor should suffice, as he may be called upon to pay debts, and this rule therefore prevails until you can fix the debtor with much more precise notice than we have here, that the estate has been all administered.

If the money had been paid by the Earl of *Durham's* trustees, no doubt they would have been discharged; and even if the Earl himself was aware of the trusts of the will, all he would know would be that there was a will, and that after the debts were paid the executors would hold the residue upon certain trusts; but there would be nothing to fix him with knowledge that all the debts were paid, which must be the case in order to convert the executors into trustees.

The main argument, however, was that the Earl of *Durham* knew of a breach of trust, and knew that the executors were bound to call in this debt, and the case has been put as if the executors had called in the £5000 due from the trustees and had lent it to the Earl of *Durham*. But the case cannot be put so high as that, because the money was never in the hands of the executors. Before the year had expired, and whilst they were getting in the assets, they found a bond given on behalf of the Earl, which he proposed to take upon himself. If the debt had not existed the executors might well be held liable for having created the obligation in the event of the money being lost. But that was not the case; the executors were ready to accept the liability of the Earl; no loss has accrued from the change of security, and it cannot be compared with the case of money received and then lent out again. It is, in fact, a security given by the Earl of *Durham* in the place of a former security, and all that happened afterwards was, that the money remained outstanding for some years.

That being the case, and there being no authority to induce the Court to say that the mere circumstance of delay by executors in calling in money fixes the person liable to pay with knowledge of the trusts of the will, the case of the Plaintiffs entirely fails on that ground.

There was an attempt to shew that *Philipson* knew that the debts were paid, but the evidence is far from enough to prove that he did.

L. C.
1869
CHARLTON
v.
EARL
OF DURHAM.

The case is simply this: the Earl of *Durham* undertook to pay a debt which other people had undertaken to pay for him, and he undertook it at a time when the executors were the proper persons to receive the money, and he carried his undertaking into effect by giving a bond to the executors jointly. As to the case of *Hosier* v. *Arundell* (1), where Mr. Justice *Chambre* says that the Plaintiffs would recover the money as trustees for the estate of their testator, all he meant was that they took it as executors.

Then it was said, that on the former occasion the Earl of *Durham* did take the receipts of both, and intended in this case to have the receipts of both; but if the receipt of one is a sufficient discharge there is no equity raised against him, because he desired to have the receipts of two, and he cannot be taken to have waived his rights by so doing. It is argued that his conduct shewed that he knew he ought to have the receipts of both, but to hold that would strain the principle to an extreme length. No doubt he desired to have the receipt of both, as is usually done, but if he has failed, there is no equity to deprive him of his legal right to treat the receipt of one as a valid discharge. The Plaintiffs have completely failed to make out their case, and the appeal must be dismissed with costs.

Solicitor for the Plaintiffs: Mr. *T. H. Dixon*, agent for Messrs. *Ransom, Son, & Mesnard, Sunderland.*

Solicitors for the Defendant: Messrs. *Shum & Crossman*, agents for Messrs. *Philipson, Newcastle.*

(1) 3 B. & P. 11.

CRUSE *v.* PAINE.

L. C.
1869
Feb. 24.

Custom of Stock Exchange—Sale of Shares—Indemnity—Registration guaranteed.

A firm of stock-jobbers agreed on the *Stock Exchange* to buy 100 shares for a certain day, and on the sale-note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase-money; the seller executed the deed of transfer, and delivered it to the transferee. The transferee never registered the transfer, and calls were made upon the seller, who filed a bill against the jobbers for indemnity, and had since died:—

Held, that the jobbers were liable to indemnify the estate of the seller.

Decree of *Giffard*, V.C., affirmed.

ALBERT CRUSE, the Plaintiff in the original bill in this cause, through his brokers, agreed on the *Stock Exchange* to sell to the Defendants, Messrs. *Paine*, who were stock-jobbers, 100 shares in a company called the *Contract Corporation*. The sale-note was in the usual form, with the addition of the words, "with registration guaranteed." The sale was for the 15th of November, previous to which day Messrs. *Paine* sent to the Plaintiff's brokers the name of *R. H. Hutchinson* as the person to whom the shares were to be transferred. The purchase-money was duly paid to the Plaintiff, and he duly executed a deed of transfer to *Hutchinson* and delivered it to him. The transfer was never registered by *Hutchinson*, and calls were made upon *Cruse* in respect of the shares. In October, 1867, *Cruse* filed his bill against Messrs. *Paine* for indemnity, and died in January, 1868. *J. Simon*, executor of *Cruse*, proved his will, and swore that the estate was under £100. The suit was revived by *Simon*, and was heard before the Vice-Chancellor *Giffard*, who made a decree directing the Defendants, Messrs. *Paine*, to indemnify the estate of *Cruse*, and to pay the amount of the calls made. The case is reported (1), where the facts are more fully stated.

The Defendants appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Higgins*, for the Defendants:—

This case was decided before the appeals in *Coles* v. *Bristowe* (2)

(1) Law Rep. 6 Eq. 641. (2) Law Rep. 4 Ch. 3.

L. C. 1869 CRUSE v. PAINE.

and *Grissell* v. *Bristowe* (1) had been heard, otherwise the decision would, no doubt, have been different. The only difference in this case is, that the contract contains the words "with registration guaranteed," but when once the transferee has been accepted by the seller, that condition is at an end, and the seller can only look to the ultimate purchaser. It is admitted that Messrs. *Paine* were not intended absolutely to take the transfer if they could find any one else. The real contract now is between *Cruse's* executor and *Hutchinson*, and these Defendants have been released: *Paine* v. *Hutchinson* (2).

Messrs. *Paine* cannot now register the shares which have been transferred to *Hutchinson*; they have found a purchaser, and the Plaintiff must compel that purchaser to register. It is possible that if *Hutchinson* does not register we may be liable at law, but there is no equity against us, and no specific performance can be decreed against us.

Then, if we are liable, what can we be called upon to pay? *Cruse* is dead, leaving an estate of less than £100; the executor is under no personal liability, and whom are we to indemnify? If the case was tried, as it ought to be, at law, the present Plaintiff must shew his damage, and what would that be? The only result of decreeing this indemnity will be to benefit the creditors on *Cruse's* estate, a most extraordinary result. Probably all the money will go to the *Contract Corporation*, and surely a Court of Equity will not make a decree to that effect.

Mr. *Mellish*, Q.C., and Mr. *Marten*, for the Plaintiff:—

The words in question make all the difference. The strong argument against the Plaintiff in *Coles* v. *Bristowe* was, that he was trying to get the benefit of such a contract as this without paying the price. When these words are added, the liability of the jobber does not cease until the registration has been effected by some one, and he has had his profit in the lower price. In the ordinary case, there is a novation of the contract, there is none here, and that constitutes the difference. As to the estate of *Cruse* being insolvent, who ever heard that the insolvency of a Plaintiff was a defence to a suit? If such a defence was admitted, the accounts of a testator's

(1) Law Rep. 4 C. P. 36. (2) Law Rep. 3 Ch. 388.

estate must always be taken before his executors can prosecute a suit, and how can the Court direct those accounts in such a suit as this?

Sir *Roundell Palmer*, in reply:—

If the Plaintiff is left to proceed at law, he will recover damages equivalent to the amount he may have paid, but how can he be decreed damages when he has incurred no loss. There can be no specific performance in a case like this, only damages. It is now decided that these contracts do not create the immediate relation of vendor and purchaser between the seller and the jobber, and it cannot be argued that the addition of the words "with registration guaranteed" prevents the substitution of another purchaser. All the jobber does is to contract to find a purchaser who will agree to register, and the seller must be left to his remedy against that purchaser.

LORD HATHERLEY, L.C., said that *Coles* v. *Bristowe* (1) and *Paine* v. *Hutchinson* (2) had established that in the case of an ordinary sale to a jobber the real contract was, that at the settling-day he would either take the shares himself, or give the names of one or more transferees who would pay for the shares, and to whom no reasonable objection could be taken. In this case, however, there was superadded an express provision that the sale was made not ordinarily and simply, but with registration guaranteed. These words introduced a material distinction, the exact meaning of which the Court was now called upon to arrive at. Sir *Roundell Palmer* had contended that the only meaning was, that the vendor could call upon the jobber to proceed against the purchaser, and compel him to register; but that was not a sound construction of the contract, which was one inseparable bargain for a price fixed with reference to this guarantee, and the terms were not merely that the jobber should find a purchaser who would pay for the shares and accept the transfer, but that the jobber should find a purchaser who would do that, and would also register the transfer; and until that had been done the jobber was not discharged from his engagement.

It was reasonable that a custom and practice followed so long on the *Stock Exchange* should be recognised, and that such contracts should be held to be not completed until the jobber had either

(1) Law Rep. 4 Ch. 3. (2) Law Rep. 3 Ch. 388.

L. C. 1869 CRUSE v. PAINE.

himself paid for the shares and registered the transfer, or had procured a purchaser to do so. And as Mr. *Hutchinson* had never been registered as the holder of these shares, the original contractor had not performed the whole of his contract, and remained liable to perform it. Of course these contracts were only entered into when there was doubt and difficulty as to the company, and there was always a sacrifice of price; it would therefore be a strange construction to hold that the only contract was to find some one who would contract to register. Risks of this kind might go on for years if the seller was obliged to rely on such a guarantee, and his only remedy would be to go before a jury and get such prospective damages as they might think him entitled to at the time, or else he must remain on the list awaiting the inconvenience of having calls made.

His Lordship agreed entirely with the construction put in the Court below upon the contract, and considered that the original purchasers remained liable upon their contract, as they had found no one to register the transfer. The fact of the transfer having been executed did not affect the case, as the Plaintiff would be bound to accept any transferee, and the execution of the transfer was absolutely necessary in order to enable the Defendants to fulfil their contract.

His Lordship then made a slight variation in the decree, but directed the Defendants to pay the costs of the appeal.

Declare that the Defendants are to pay the costs of the suit up to and including the costs of the appeal. That the Defendants are, by virtue of the agreement with the late Plaintiff, liable to procure registration of the shares in the name of some person other than the Plaintiff on or before the 15th of November, 1865, and are now bound to procure the release or discharge of the late Plaintiff's estate from the payment of all calls which have been made on such shares since that date; and further to indemnify the estate against all costs, damages, and expenses in respect of such calls, or otherwise on account of the shares remaining in the name of the late Plaintiff after the date aforesaid, and let the Defendants procure such release or discharge accordingly, either by payment of the said calls or otherwise, and indemnify his estate against all such costs and damages as aforesaid. Liberty to the Plaintiff in the revived suit to apply in Chambers in respect of such release and discharge and indemnity, and also as to subsequent costs.

Solicitors for the Plaintiff: Messrs *Thomas & Hollams.*

Solicitors for the Defendants: Messrs. *Lewis, Munns, & Co.*

AUSTER *v.* HAINES.

L. C.
1869
March 24.

Practice—Revivor—Infants—15 & 16 *Vict. c.* 86, *s.* 52.

Where proceedings had been taken in a suit after it had become defective by the birth of children:—

Held, that there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, bringing before the Court the children who were infants, and directing that they should be bound by the proceedings; but that a bill was necessary for the purpose.

IN this case a decree had been made for the administration of the estate of *Samuel Haines*, certain accounts and inquiries had been directed, and certificates had been made. After the decree was made, two children had been born who took interests under the will of the testator, and the suit had thereby become defective; such of the proceedings in the suit as had taken place since the birth of the children were therefore defective.

These facts were stated to the Vice-Chancellor *Stuart*, and an application was made to him for an order to carry on the suit against the newly-born children, and that they might be bound by the previous proceedings.

The Vice-Chancellor *Stuart* thought that the order might be made under 15 & 16 Vict. c. 86, s. 52, without having a bill filed, but wished the matter to be mentioned to the Lord Chancellor (1).

Mr. *Dauney* now made the application, stating that similar

(1) 1869. March 16.

SIR JOHN STUART, V.C.:—

In this case the question is, whether infants born since the decree can be bound as to proceedings subsequent to their birth by an order of revivor and supplement, on an allegation under the statute 15 & 16 Vict. c. 86, s. 52, or whether it is necessary to file a bill.

There is, unfortunately, a want of uniformity in the decisions. The case of *Capps* v. *Capps* (Law Rep. 4 Ch. 1) has properly been cited as an authority to shew that in such a case an allegation under the statute is not sufficient, and that a bill is necessary.

In the present case enough has been stated to make it probable that the two children are members of a class entitled as devisees or legatees in diminution of the right formerly existing in the children who have been parties to the previous proceedings. If this be so, I apprehend that a bill is not necessary, and that a statutory order on an allegation is sufficient.

The case of *Capps* v. *Capps* seems

L. C. 1869 AUSTER v. AINES.

orders had been made, as mentioned in *Capps* v. *Capps* (1); and that until the decision in that case they had been considered regular. If not, the intention of 15 & 16 Vict. c. 86, s. 52, would,

---

not consistent with this view. But the facts are not stated with sufficient fulness or precision in the report of that case to make that case a guide. The reporter says that the order was applied for on "the usual allegation." It is not easy to understand what is meant by "the usual allegation." But it seems clear that it was not a sufficient allegation. There is nothing to shew that the facts might not have been stated so as to justify an order to revive and have the benefit of the proceedings against the infant heir without a bill, if a guardian *ad litem* was appointed, according to the statute and General Orders; and if that guardian did not shew cause against the order within twelve days, pursuant to the General Order.

So far as I understand it, the ground for refusing the order in *Capps* v. *Capps* was the infancy of the heir. If so, the 32nd Cons. Ord. as to revivor and supplement seems to have been overlooked by Lord *Cairns*. According to that Order an infant (who, according to the words of the Order, is a "person under a disability other than coverture") may apply to discharge or shew cause against the order within twelve days after the appointment of a guardian *ad litem*; and until such period of twelve days shall have expired, the order to revive made on the statutory statement is to have no force or effect as against the infant. According to the 52nd section of the Act 15 & 16 Vict. c. 86, the guardian *ad litem* of the infant can, within the prescribed time, shew as a ground for discharging the order any matter which would have been a defence to a bill of revivor and supplement.

It would, therefore, appear that the statute and the General Order requiring a guardian *ad litem* to be appointed, and allowing twelve days to shew cause after he is appointed, is a protection as effectual to the infant as if the old and more expensive and cumbrous practice of a bill was resorted to.

Indeed, the object of the 52nd section of the Act seems to have been that bills of revivor and supplement should be entirely put an end to. It is to be regretted that the 32nd Cons. Ord. § 3, by mentioning bills of revivor and supplement, countenances the notion that they are still necessary. That Order was framed long before the statute, and it was, perhaps, by an oversight that it was incorporated in the Cons. Ord.

It has been suggested that the usual order to revive does not extend to binding parties by proceedings had in the suit before they were born or made parties. That is true. But the words of the statute are not merely "the usual order to revive," but "the usual supplemental decree." According to the plain language of the statute, an order to the effect of the usual supplemental decree may be obtained as of course, on an allegation of the suit having become defective, and of the change or transmission of interest or liability.

The birth of a child after the decree, and the proceedings under it, where that child has acquired an interest which it is sought to bind by the proceedings taken before its birth, seem

---

(1) Law Rep. 4 Ch. 1.

to a great extent, be frustrated. The words of the statute seemed to include this case, and to make the expense of a bill no longer necessary.

LORD HATHERLEY, L.C., said he thought that there was very good reason for a difference where infants were to be bound; but, independently of that consideration, he would be very much indisposed to alter a rule upon a point of practice which had been laid down by the late Lord Chancellor. The application must be refused (1).

Solicitors: Messrs. *Austen, De Gex, & Harding.*

---

to me within the scope of the 52nd section, as it is a case in which there has been a change or transmission of interest or liability. If so, the statute intended that the supplemental order should be made on allegation, and not on bill filed.

Till the decision in *Capps* v. *Capps* this was the construction put upon the statute, and many orders have been made on that construction. In *Seton* on Decrees, p. 1170, instances of such orders under the head of "Birth of a Child," are given.

It is obvious that a departure from this construction of the statute by the decision in *Capps* v. *Capps* is likely to occasion serious expense and inconvenience, by stamping with the character of irregularity many orders on which estates and the affairs of families have been dealt with by the Court.

His Honour, however, declined to make the order, and expressed his wish that the matter might be mentioned to the Lord Chancellor.

(1) See *Egremont* v. *Thompson*, *post*, p. 448.

L. C.
1869
March 24.

3 Eq 202.

EGREMONT *v.* THOMPSON.

Practice—Revivor—Infants—15 & 16 *Vict. c.* 86, *s.* 52.

Where, after an administration suit had been instituted, a child was born who took an interest in the property:—

Held, that there was jurisdiction to make an order under 15 & 16 Vict. c. 86, s. 52, bringing the child before the Court and directing that he should be bound by the previous proceedings in the suit.

IN this case an administration suit had been carried on for some time, one of the Defendants being a tenant in tail who represented the inheritance. A child was now born whose estate preceded that of the Defendant tenant in tail, and

Mr. *Martineau* asked for an order under 15 & 16 Vict. c. 86, s. 52, that the Plaintiffs might be at liberty to carry on the proceedings against the infant as if he had been a party to the suit. He cited *Lloyd* v. *Johnes* (1).

LORD HATHERLEY, L.C., said that this was quite a different case from *Auster* v. *Haines* (2). The suit had been regularly conducted, and all that was now wanted was to give effect to what had been done. The Plaintiffs did not ask to have effect given to anything which had been done since the infant came into existence, and by which he would have been entirely unaffected. The common order might be made in this case.

Solicitors: Messrs. *Walker & Martineau.*

(1) 9 Ves. 37. (2) *Ante*, p. 445.

HOLLAND *v.* HOLLAND.

L. JJ.
1869
April 24.

Breach of Trust—Specialty Debt—Covenant.

Where a trustee had executed a deed containing merely an appointment of him as trustee, and a declaration by him that he accepted the office:—

Held, that no covenant by him would be implied, and that a claim for trust money received and misapplied by him would not constitute a specialty debt against his estate.

Order of *Stuart*, V.C., reversed.

THE question on this appeal was whether money due from the estate of a trustee in consequence of a breach of trust by him was a specialty debt.

Henry Clarke, who died in December, 1856, devised his real estate to *Joseph Clayton* and *Bartholomew Clayton*, upon trust for his wife for life, and after her death upon certain other trusts. He then bequeathed his residuary personal estate to the same trustees upon trust to sell and pay his debts, and to invest the surplus, and hold the investments upon trusts which would correspond with those of his real estate. And the testator declared that if either of the trustees died or became unwilling to act, then it should be lawful for the surviving or continuing trustee, with the consent of his wife during her life, and of certain of the *cestuis que trust*, to nominate any fit person or persons to supply the place or places of such trustees or trustee.

By an indenture, dated the 30th of January, 1857, after reciting the will of *H. Clarke*, and that *Joseph Clayton* had renounced the trusts thereof, *Bartholomew Clayton* nominated *J. B. Millington* a a trustee in the room and stead of *J. Clayton*, and the trust estate was conveyed accordingly.

J. B. Millington died in 1859.

By an indorsed indenture, dated the 10th of December, 1859, and made between *Bartholomew Clayton* of the first part, *Elizabeth Clarke*, and Sir *Alan Bellingham* and Dame *Elizabeth* his wife (the *cestuis que trust*), of the second part, and *Frederick Cooke* of the third part, after reciting the death of *J. B. Millington*, and that *B. Clayton*, the surviving trustee, in execution of the power vested

L. JJ. 1869 HOLLAND v HOLLAND.

in him by the will of *H. Clarke*, had proposed to appoint *Frederick Cooke* in the place of *J. B. Millington*, with the consent of the parties thereto of the second part, and that *Frederick Cooke* had consented and agreed to become such trustee accordingly, as he did thereby testify and declare, it was witnessed that in consideration of the premises, *Clayton*, by virtue and in execution of the power or authority to him given, or in him vested in this behalf by or by virtue of the said will of *Henry Clarke*, and of any and every other power him hereunto enabling, and with the consent of *E. Clarke* and Sir *A. Bellingham* and his wife, testified by their execution, did thereby nominate and appoint *Frederick Cooke* to be a trustee in the room of *J. B. Millington* for all the trusts and purposes, and with all the powers and authorities expressed and contained in the will of *Henry Clarke*, so far as the same trusts, purposes, powers and authorities were then subsisting undetermined or capable of taking effect, "and the said *Frederick Cooke* doth hereby testify and declare his acceptance of the trusteeship." The indenture also contained a conveyance of the real estate, and an assignment of the personal estate by *B. Clayton* to the use of himself and *F. Cooke*, upon the trusts and with and under the powers declared in the said will, but contained no further declaration of trust by *F. Cooke*. It was signed and sealed by all the parties.

Bartholomew Clayton died in 1866, after which *F. Cooke* appeared to have possessed himself of the trust estate under the will, and to have misapplied it. He died in 1867, and a creditors' suit was instituted for the administration of his estate. New trustees had been appointed under the will of *H. Clarke*, and they carried in a claim against the estate of *F. Cooke* for £4695 principal and £320 interest. The claim was not disputed, and the only question raised was, whether it was a specialty debt or a simple contract debt. The Vice-Chancellor *Stuart*, on a motion to vary the certificate of his Chief Clerk, held the debt to be a specialty debt, and made an order accordingly (1).

(1) 1869. Feb. 11. SIR JOHN STUART, V.C.:—

In this case the testator, *Frederick Cooke*, executed a deed by which he accepted the trusts of the will of *Henry Clarke*.

The effect of the execution of the deed was to impose upon him the obligation of performing the trusts. An obligation for the performance of a duty or payment of a debt, when that obligation is under the hand and seal of the

The parties to the administration suit now moved by way of appeal that the order of the Vice-Chancellor might be discharged.

---

party who undertakes the discharge of the duty or the debt, is an obligation by specialty.

In *Bacon's* Abridgment, tit. "Obligation," it is said that the party's seal acknowledging the debt or duty, and confirming the contract, renders it a security of a higher nature than those entered into without the solemnity of a seal, and therefore bonds or specialties shall be preferred to simple contract in a course of administration. The execution of the deed by which *Cooke* accepted the trusts, bound him under his hand and seal to perform them; and this is an obligation under his seal, and cannot be a simple contract. Indeed, it is laid down in *Rolle's* Abridgment that where there is a previous simple contract the acceptance of an obligation under seal for the same matter extinguishes the simple contract, and this, I apprehend, is undoubted law.

There are various *dicta* in the books of reports to the effect that a breach of trust creates only a simple contract debt. Where the trust is created by will, or by writing, or declaration not under seal, the trustee is not in any way bound by specialty.

I have thought it my duty carefully to examine the authorities, and I find the result to be that, with the exception of two recent cases, all those in which the Court of Chancery has refused to allow a claim against the assets of a trustee for a breach of trust to be a specialty debt, and has held the *cestuis que trust* to rank among simple contract creditors, are cases where the trust was created by will, and where the trustee had executed no deed under his hand and seal which bound him to the performance of the trust.

The two recent cases in which the contrary has been held are *Wynch* v. *Grant* (2 Drew. 312) before the Vice-Chancellor *Kindersley*, and *Isaacson* v. *Harwood* (Law Rep 3 Ch. 225), before Lord *Cairns*, sitting alone as a Lord Justice. In both these cases the view taken was that unless the relation of debtor and creditor was constituted under hand and seal, the assets of the trustee could not be liable as upon a specialty debt, although the relation of trustee and *cestui que trust* is acknowledged or declared or constituted under hand and seal.

Both upon authority and upon principle this view seems to be a mistake.

In *Isaacson* v. *Harwood* it is said the question is, "was it intended that the trustee should give a covenant for payment of the money?" It is plain enough that if the trustee covenants to pay the money, it is not a case of trust at all, but a legal debt. The relation of trustee and *cestui que trust*, and of debtor and creditor, are essentially different, for the rights and remedies of a *cestui que trust* are entirely equitable. Except in an exploded *dictum* of Lord *Hobart*, who said that a *cestui que trust* might bring an action at law for a breach of trust, there is no authority and no principle to support the notion that the equitable obligation of a trustee to perform a trust, whether created by will, or writing not under seal, or by declaration of trust under seal, makes the *cestui que trust* his creditor either by specialty or simple contract. The *cestui que trust* has an equitable right against the assets of the trustee who commits a breach of trust, and if the obligation of the trustee for the performance of the trust be not under seal the demand of the *cestui*

(1) 18 Jan 1870

L. JJ.
1869
HOLLAND
v.
HOLLAND.

Mr. *C. Hall*, and Mr. *Speed*, for the Appellants:—

Where there is no positive declaration of trust there is no specialty: *Adey* v. *Arnold* (1). It does not appear in that report,

que trust cannot rank above debts by simple contract.

In a case where the *cestui que trust* would rank with simple contract creditors, his demand is purely equitable, and he is no more a creditor on a legal simple contract than he would be a legal specialty creditor where, as in *Gifford* v. *Manley* (Cas. t. Talb. 109), *Benson* v. *Benson* (1 P. Wms. 130), and other cases, he was ranked among specialty creditors because the trust was declared under hand and seal, and the obligation which conferred the equitable right was an obligation by specialty.

The Vice-Chancellor *Kindersley* in *Wynch* v. *Grant* (2 Drew. 312) said that there is no such thing as an equitable covenant if there is not a legal covenant. But where there is the legal solemnity by execution under hand and seal, it would seem that an equitable demand arising from an obligation with this solemnity, as it cannot be simple contract, must rank in equity as a demand on a specialty. It is impossible to recognise any soundness in the argument that in a deed under seal, a recital that the trustee accepts the trusts amounts to a covenant to accept the trusts but is not a covenant to perform them, though it was upon that argument that the decisions of Vice-Chancellor *Kindersley* and of Lord *Cairns* proceed.

It is due to the Vice-Chancellor *Kindersley* to observe that in the case of *Richardson* v. *Jenkins* (1 Drew. 477), he expressed views more reconcilable with the better authorities.

Before referring to the earlier cases, which establish what seems to be the true doctrine, I ought to notice the decision of Lord *St. Leonards* in *Adey* v. *Arnold* (2 D. M. & G. 432), and the two cases of *Vernon* v. *Vawdry* (2 Atk. 119; Bar. 280), and *Cox* v. *Bateman* (2 Ves. Sen. 19), both before Lord *Hardwicke*, which seem to have misled the text-writers.

Lord *St. Leonards'* decision in *Adey* v. *Arnold*, I understand to be founded on the fact that the trustee had not executed the deed. His views are not fully expressed in the report of his judgment. But his reference to the observations of Lord *Eldon* in *Montford* v. *Lord Cadogan* (19 Ves. 638), shew that he did not treat the rights of the *cestuis que trust* as legal rights, or as depending on the legal relation of debtor and creditor.

That which seems really to have misled text-writers is the language attributed by *Atkyns* to Lord *Hardwicke* in his report of the case of *Vernon* v. *Vawdry*. On reference to the report of that case in *Barnardiston*, where the facts are fully stated, and the judgment fully reported, the error is apparent. *Atkyns* reports Lord *Hardwicke* to have decided that "A breach of trust is considered but as a simple contract debt, and can only fall on the personal estate of a trustee, and the particular circumstances of a case ought not to vary the rule." Now *Barnardiston* is not a reporter to be relied upon in all cases. But I have satisfied myself of his accuracy in the report of *Vernon* v. *Vawdry*. It was the case of a claim

(1) 2 D. M. & G. 432.

but is stated in another report of the same case (1), and we have ascertained it to be the fact, that the trustee executed the deed. So in *Wynch* v. *Grant* (2), and in *Isaacson* v. *Harwood* (3). There

---

under a marriage settlement executed by an infant husband, who covenanted to settle lands on certain trusts and when he came of age refused to confirm the settlement, and an indorsement of his refusal was written on it, but not executed by him. Lord *Hardwicke* decided, on an elaborate review of his conduct, and of various letters written by him, that he was bound in equity to perform the settlement. But as he was only bound by his conduct, and not by the execution under seal while he was an infant, there being no binding obligation under seal, the *cestuis que trust* were held to rank with simple contract creditors.

Applying the language attributed to Lord *Hardwicke* by *Atkyns* to these facts it is quite intelligible, but as a general and unqualified proposition it cannot be applied to an obligation to perform a trust under the seal of the trustee.

Unfortunately, the text-writers (not excepting Mr. *Fonblanque* and Mr. *Lewin*) have understood it in an unqualified sense. I have referred to the Registrar's book for the case of *Cox* v. *Bateman* (2 Ves. Sen. 19), and find it was the case of a breach of a trust created by will, and that the trustee had not executed any instrument under his hand and seal. It is scarcely necessary to notice *Baily* v. *Ekins*, a case reported in the 2nd vol. of *Dickens'* Reports, p. 632. The accuracy of his reports is not to be relied upon, and this case is a remarkable instance of inaccuracy. He reports it to have been laid down by Lord *Thurlow*, that when there was a covenant to settle an estate, if the covenantor sold the estate he was only to be considered as a trustee and a debtor by simple contract, but that if a judgment at law was recovered on the covenant he became a debtor by specialty, that is, that when by the judgment the debt becomes a debt of higher order than a debt by specialty, it was then, and not till then, a specialty debt.

I shall now mention the cases which establish the doctrine that where a trustee has executed a deed declaring, acknowledging, or accepting the trusts, the demand of the *cestui que trust* against his assets has been ranked amongst specialty debts.

In *Gifford* v. *Manley* (Cas. t. Tal. 109) Lord *Talbot*, affirming the decree of Sir *Joseph Jekyll*, so decided. On referring to the Registrar's book it appears that the *cestuis que trust* were the Plaintiffs. By the marriage articles, under hand and seal of the trustees, trusts were declared for the husband and wife and children of £400 paid to the trustees, and a receipt for the money was indorsed on the articles and signed by both trustees. Afterwards one of the trustees by writing (not under seal) declared that he had received the whole money, and that his co-trustee had received none of it. There was no debt constituted beyond the equitable obligation, and that being under hand and seal, the *cestuis que trust* were admitted to rank with specialty creditors of the trustee who had received the money.

---

(1) 16 Jur. 1123.

(2) 2 Drew. 312; 18 Jur. 1010.

(3) Law Rep. 3 Ch. 225.

L. JJ. 1869 HOLLAND v. HOLLAND.

is nothing in this deed but a mere acceptance of the office, the trustee merely says that he has been named and accepts, and there is no declaration that he will hold the estate upon the trusts of

---

Benson v. *Benson* (1 P. Wms. 130) is to the same effect. A sum of £2000 was agreed by marriage articles under hand and seal to be invested in land to be settled upon trust for the husband and wife and children. The husband received the money and did not invest. The son, as *cestui que trust*, filed a bill against the legal personal representative of the husband. It was objected for the Defendant that this was not a debt by specialty, there being no express contract to pay it, so that at worst it was but a breach of trust. But the Court held the *cestui que trust* entitled to rank with specialty creditors.

It is to be observed that where there is a legal covenant to pay a sum of money to trustees who declare that they will hold the money upon trust for the benefit of certain persons, the trustees are at law specialty creditors of the covenantor on a legal obligation. When they recover the money their declaration of trust is in no respect a legal obligation, and the right of the *cestuis que trust* is not a legal right as creditors at all. When Lord *Eldon*, in *Montford* v. *Lord Cadogan*, said that the general words "it is declared and agreed" amount to a covenant, he did not mean such a legal covenant as to constitute a debt, and he spoke only of the obligation in equity, and not of a legal covenant; for the trustees in that case had not executed the deed, and had not bound themselves under hand and seal. But Lord *Eldon* says that nevertheless they have in equity undertaken to execute the trusts exactly as if they had executed the instrument.

Sir *Lancelot Shadwell's* decisions in *Mavor* v. *Davonport* (2 Sim. 227), and in *Turner* v. *Wardle* (7 Sim. 80), proceed on the same principle. There were no words amounting to a contract or covenant to pay in the sense of a legal obligation; but there was in both cases a recognition under hand and seal of the duty to perform the trust, and the *cestuis que trust* were ranked with specialty creditors.

In *Wood* v. *Hardisty* (2 Coll. 542) it was held that the *cestuis que trust* should rank with specialty creditors, where the declaration of trust was under the seal of the trustees.

Upon the whole, this seems to be plain, that the rights of the *cestui que trust* against his trustee are purely equitable, that the relation of trustee and *cestui que trust* is not that of debtor and creditor; that if the right of the *cestui que trust* is put on the footing of his being a creditor of the trustee, it is no longer a question of trust, or breach of trust, but a case of debt and breach of legal contract; and if by deed under his hand and seal the trustee recites the breach of trust, that is certainly an acknowledgment by specialty of the obligation, unless, indeed, it were possible to hold that there is any difference between the acknowledgment of a trust under seal and the declaration of a trust under seal. In the present case the trustee has testified his acceptance of the trust by his deed under hand and seal. This is an obligation under seal to perform the trust, and whether the words be words of acceptance of the trust, or acknowledgment of the trust, or declaration of the trust, the obligation is the same.

For these reasons, feeling bound by the law as laid down by Lord *Talbot*, Sir

the deed. In fact he need not have executed the deed. Where no action on a special contract can be brought, there can be no specialty debt.

Mr. *Dickinson*, Q.C., and Mr. *Davey*, for the trustees of the will:—

In some cases a breach of trust has been held to constitute a specialty, in others not, but in no case has the test of bringing an action been applied, for in no case could an action have been brought. What is the difference between undertaking to apply money to certain purposes, and undertaking to pay money to a certain person. In *Turner* v. *Wardle* (1) the *cestuis que trust* were held to be specialty creditors. In *Bac.* Abr. tit. "Obl." (2), it is said, that if I by deed acknowledge that I have borrowed money of you, by the same deed I engage to pay it. *Wood* v. *Hardisty* (3) is a clear decision that such a debt is a specialty. The transaction is clearly a contract between the parties, and is under seal, and therefore clearly creates a specialty debt, unless there is any declaration to the contrary. In *Isaacson* v. *Harwood* (4) there was no declaration of trust as here. It is not necessary in this Court that a specialty debt should be one upon which an action can be brought.

[The LORD JUSTICE GIFFARD:—To make it a specialty it must be enforceable at law. There is no specialty in equity. No man has ever been made a bankrupt on a breach of trust.]

This case is stronger than *Wynch* v. *Grant* (5), where the trustee certainly did not do more than engage to be a trustee, not to perform the trusts. In *Richardson* v. *Jenkins* (6) there was only a contract to become a trustee, and there is a material distinction between that and a contract to hold the property: *Benson* v. *Benson* (7). In *Adey* v. *Arnold* (8) there was no declaration of

---

Joseph Jekyll, Sir *John Trevor*, Lord *Eldon*, Sir *Lancelot Shadwell*, and the Vice-Chancellor *Knight Bruce*, I must hold that the *cestuis que trust* are entitled to rank as specialty creditors.

(1) 7 Sim. 80.
(2) B. p. 804.
(3) 2 Coll. 542; 10 Jur. 486.
(4) Law Rep. 3 Ch. 225.
(5) 2 Drew. 312.
(6) 1 Ibid. 477; 17 Jur. 446.
(7) 1 P. Wms. 130.
(8) 2 D. M. & G. 432.

L. JJ. 1869

HOLLAND v. HOLLAND.

trust, but many cases shew that where there is a declaration a specialty debt is constituted.

[The LORD JUSTICE GIFFARD :—*Adey* v. *Arnold* (1) must be held to have settled that a mere acceptance of a trust without any declaration of trust will not create a specialty debt.]

It is clear that the power of bringing an action cannot be the test, for there may be no person in existence who can bring the action, and yet the debt may be a specialty, as in *Benson* v. *Benson* (2). There is no action against trustees for money had and received, or on a declaration of trust, and yet that may constitute a specialty: *Newport* v. *Bryan* (3). The deed is under seal, and what reason is there for saying that it was not the intention of the parties that the trustee should bind himself to execute the trusts. There are two declarations by the trustee, one in the recital, and one in the deed, and he must be held to have declared that he will perform the trusts.

Mr. *C. Hall* was not called upon to reply.

SIR C. J. SELWYN, L.J. :—

The first question which arises in this case is, whether the deed of the 10th of December, 1859, by which the testator, whose estate is being administered in this suit, was appointed trustee, is to be construed as containing nothing more than an appointment of the testator to a certain trusteeship, and an acceptance by him of that trusteeship, or is to be construed as containing a covenant, or words equivalent to a covenant, on his part to do some special act, or to perform some duty. It has been argued that as the acceptance of the trust is twice referred to in the deed, it must be construed as if something more than a mere acceptance of the trust was intended, or must be implied; and if that acceptance had been twice referred to in the recital, or twice in the operative part of the deed, there would have been considerable force in that argument. But in this recital one thing is referred to as a thing proposed to be done, and then, according to the usual form adopted by conveyancers, the same thing is witnessed to have

(1) 2 D. M. & G. 432. (2) 1 P. Wms. 130.
(3) 5 Ir. Ch. Rep. 119.

been done by the operative part of the deed. I think that both the recital and the operative part have one and the same object and effect, namely the appointment to the trusteeship on the one hand, and the acceptance of it on the other, but that there is no express covenant to do any special act, or to perform any duty, and I think that no such covenant can be implied. The cases of *Courtney* v. *Taylor* (1), and *Marryat* v. *Marryat* (2), are authorities in support of this conclusion.

Assuming, then, this to be the true construction of the deed, the next and the only remaining question is, whether in consequence of the acceptance of the trusteeship by an instrument under seal, the present debt, and, as the argument has been properly and necessarily put, every other debt which could be proved against this estate in respect of this trusteeship, ought to be considered as a specialty debt. In my judgment this question is concluded by authority. The case of *Adey* v. *Arnold* (3) was decided by Lord *St. Leonards*, in 1852, when sitting in the Court of Appeal, and it therefore possesses, as I need not say, very great weight. In that case the deed was executed by the trustee, which, in my judgment, clearly amounted to an acceptance under seal by him of the trust; and that decision, so far as I know, has never since been questioned. Even in the present case the learned Vice-Chancellor has not in any degree impugned the authority of *Adey* v. *Arnold*, for His Honour appears to have been misinformed upon a matter of fact, and to have supposed that in the case of *Adey* v. *Arnold* the deed was not executed by the trustee; and but for that misapprehension I think it probable that His Honour's decision would have been different. On the other hand, the decision in *Adey* v. *Arnold* has been followed by Vice-Chancellor *Kindersley* in the case of *Wynch* v. *Grant* (4), by the Lord Chancellor of *Ireland* in *Newport* v. *Bryan* (5), and by Lord *Cairns* in the case of *Isaacson* v. *Harwood* (6). I think that the case of *Wood* v. *Hardisty* (7) cannot be considered as an interruption to the line of authorities, nor as in any degree questioning the authority of *Adey* v. *Arnold*,

(1) 7 Scott, N.R. 749; 6 Man. & G. 51.
(2) 28 Beav. 224.
(3) 2 D. M. & G. 432; 16 Jur. 1123.
(4) 2 Drew. 312; 18 Jur. 1010.
(5) 5 Ir. Ch. Rep. 119.
(6) Law Rep. 3 Ch. 225.
(7) 2 Coll. 542; 10 Jur. 486.

L. JJ. 1869 HOLLAND v. HOLLAND.

for in that case there was an express declaration that, "subject to the trust aforesaid, the said *William Forbes*, his executors, administrators, and assigns, shall stand possessed of the said policies of assurance, and of the moneys, bonuses, and accumulations to be received in respect thereof, and of all other the premises hereby assigned, or intended so to be, upon trust for the said *Susan*, her executors, administrators, and assigns," and in any case, as a previous decision by a Vice-Chancellor, it must be treated as subordinate in point of authority to the subsequent decision of the Lord Chancellor sitting in the Court of Appeal. We may, therefore, take it that since the decision of *Adey* v. *Arnold* (1) there has been a stream of authorities flowing in the same direction, never in any way interrupted or questioned.

I think, both upon principle and upon authority, the mere fact of a trustee being a party to and executing a deed by which he is appointed trustee and accepts the office, is not of itself sufficient to justify the Court in holding that a debt of such a character as that now before us is a specialty debt.

The order of the learned Vice-Chancellor should, therefore, be discharged.

SIR G. M. GIFFARD, L.J.:—

This case has been very ably argued, and I am quite satisfied that we have heard everything which could be said in support of the decision in the Court below, but to me it appears a very plain case, both upon authority and upon principle.

As regards the authorities, I do not think it necessary to refer to more than two cases—that before Lord *St. Leonards*, and that before Lord *Cairns*. I quite agree that the case before Lord *Cairns* is not a case which is similar to this, but he laid down the principles which are applicable to these cases, and he put it simply in this way, viz.: that you are to inquire what it was that the parties intended. In *Adey* v. *Arnold*, Lord *St. Leonards* said that the Court would not raise a covenant without necessity, which, I apprehend, meant that if, from the nature of the transaction, the Court can infer that a covenant was intended, then a covenant would be raised, although there were not apt words for the purpose; but, on

(1) 2 D. M. & G. 432.

the other hand, if from the nature of the transaction the Court does not infer that a covenant was intended, then a covenant will not be implied.

Now, what is it that we have to deal with in this case? First, there is a power to appoint new trustees in the ordinary form, and then a power of consent given to tenants for life. That power was executed in this way: a deed was made to which the tenants for life were parties, to which the continuing trustee was a party, and to which the intended new trustee was a party, and the object of that deed was twofold; first of all, to appoint a new trustee; and, secondly, to convey the trust property to him. It has no other object or purpose whatever, and if we look at the deed we must conclude that nothing can be less likely or less to be inferred from the deed than that the one trustee should covenant with the other. That was not the purpose of any part of the deed at all. The deed was simply the appointment of a new trustee, and a simple conveyance of the trust property to that new trustee, and I cannot see that the witnessing part of the deed goes at all further than the recital. There is a recital that *Cooke* has consented and agreed to become a trustee, and the witnessing part of the deed is, that the trustee testifies and declares his acceptance, which is neither more or less than precluding himself by executing that deed from saying afterwards that he did not consent to become a trustee, and has not become a trustee.

The conclusion to be drawn from the case of *Adey* v. *Arnold* (1) is simply, that where there is an acceptance of a trusteeship under seal, that does not amount to a covenant; and this deed, when looked at fairly, amounts to nothing more or less than the acceptance of the trusteeship under seal; that being so, no covenant is to be implied, and I am satisfied that no covenant was intended.

For these reasons, I am of opinion that the decision of the Court below must be reversed. The costs of the appeal, as regards the Appellants, will be added to the costs in the matter; the Respondents will have no costs of the appeal, and must pay the costs of the application in the Court below.

It has been suggested that there may be such a thing as a specialty in equity which is not a specialty at law; but I do not

12 Eq. 95.

(1) 2 D. M. & G. 432.

L. JJ. 1869 HOLLAND v. HOLLAND.

hesitate to say in the plainest possible language that if there be not a specialty at law, and not such an instrument as that an action at law can be maintained upon it, this is not so; all equitable debts rank *pari passu*, and there is no distinction between one description of equitable debt and another.

Solicitor for the Appellants: Mr. *Alger*.
Solicitor for the Respondents: Mr. *Kearsey*.

L. JJ. 1869 *April* 29, 30.

In re LAND CREDIT COMPANY OF IRELAND. *Ex parte* OVEREND, GURNEY, & CO.

Company—Bills of Exchange—Conditional Authority to accept—Bonâ fide Holder.

6 Ch 582. 9 Ch 195

The directors of a general trading company, part of whose business was to accept bills of exchange, and whose articles conferred the most extensive powers of management on the directors, passed a resolution authorizing the chairman to accept bills drawn on the company by *L.*, upon *L.*'s depositing securities to a certain amount. The chairman accordingly accepted the bills, and *L.* deposited some securities, but not nearly to the specified amount. The directors by resolution affirmed the transaction, but it did not appear that they knew that the requisite amount of securities had not been deposited. The bills were entered in the books of the company, and treated as binding on them. On the company being wound up, a *bonâ fide* holder of some of the bills claimed to prove:—

Held (affirming the decision of the Master of the Rolls), that the proof ought to be admitted, for that the bills were binding on the company, as they had been accepted *modo et formâ* by the authority of the board of directors, and the provision as to the deposit of securities was a collateral matter, into the observance of which a holder of the bills was not bound to inquire.

Consideration of the mode in which authority to accept bills on behalf of a company may be given.

THIS was a motion by way of appeal from a decision of the Master of the Rolls allowing a proof on behalf of *Overend, Gurney, & Co.* on certain bills of exchange against the *Land Credit Company of Ireland, Limited*, which was now in course of winding up.

The *Land Credit Company* was formed under the *Companies Act*, 1862, and by its memorandum of association its objects, among other things, were stated to be "(1.) The making advances of money on security. (2.) The selling, transferring, and disposing of, and

otherwise using and dealing with, all or any of the securities on which any such advances are made, and the purchasing, acquiring, selling, disposing of, and otherwise dealing with, securities of all or any of the descriptions above-mentioned, and all other operations connected therewith. (3.) The borrowing of money, and the issuing of transferable bonds or mortgage debentures founded or based upon all or any of the securities or assets of the company. (6.) As a finance company, to negotiate loans of all descriptions, and to assist in the formation, development, or carrying out of any companies or undertakings. (7.) To take concessions of or work railways, or other undertakings, and either carry them out itself or make them over wholly or partly to other companies or parties. (8.) To take contracts and carry them out, either on its own account or by letting them to sub-contractors. (9.) To negotiate loans of every description, and to buy, sell, or loan on all descriptions of freehold, leasehold, or other properties, on all descriptions of produce or merchandise, and of stocks, shares, including shares issued by the company, bonds, mortgages, debentures, or obligations, on its own account or for a commission, (not being purely speculative transactions for the rise or fall in prices, and in which it has no other interest, as time bargains, or the ordinary business of a stockbroker or jobber,) and to re-issue any such stock, shares, or other securities with or without the company's guarantee. (10.) To make advances on such stocks or other securities, and on property of all descriptions, either with the borrowers' bills, promissory notes, or other securities. (11.) To accept and indorse bills. (14.) Generally to transact any business of a merchant and capitalist, as principal or agent, in the *United Kingdom*, or elsewhere, which may not in the articles of association, or by special resolution of the company, be prohibited."

The 68th of the articles of association was as follows: "No person, except the directors and the managers, and other persons thereunto expressly authorized by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to make, accept, or indorse any promissory note, or bill of exchange, or other negotiable instrument, on behalf of the company, or to enter into any contract, so as to impose thereby any liability on the company, or otherwise to pledge the

L. JJ. 1869

In re LAND CREDIT COMPANY OF IRELAND.

Ex parte OVEREND, GURNEY, & Co.

credit of the company." Sect. 86 conferred very extensive powers on the directors, and in the list of powers was, "To accept and indorse bills." By clause 105 it was provided that the quorum of directors was to be three, "or such other number as the directors may from time to time determine."

In May, 1864, *D. L. Lewis*, who stated himself to be owner of all the shares and debentures in the *Cork and Youghal Railway*, made a proposal to the company that they should advance money to him on the security of that railway, which resulted in the following agreement, subject to the approval of the board of directors:—

"First: Price of *Cork and Youghal Railway*, £460,000, to be paid as follows:—£260,000 cash down, £200,000 by open credit for twelve months, interest at the rate of £5 per cent. and bill-stamps to be added to the bills. Mr. *Lewis* guarantees £5 per cent. on the £460,000, the revenue of the said line being the property of Mr. *Lewis*. Mr. *Lewis*, in addition to the £5 per cent. guarantee, pays a bonus of £23,000 cash down and £23,000 on the conclusion of the two years. It shall be at any time during the two years allowable for Mr. *Lewis* to re-purchase the line at £460,000, paying the second bonus and the £5 per cent. interest up to the date of re-purchase. In consideration for the above, Mr. *Lewis* agrees to subscribe for £200,000 worth of stock in the *Land Credit Company*, and to pay up at once £100,000 thereon. The stock to be charged to the company as a collateral guarantee for the £5 per cent. interest and second bonus. At the expiration of the two years, should Mr. *Lewis* not have re-purchased the line from the *Land Credit Company*, the company shall be at liberty to sell the line, and should any deficiency accrue it shall be met by the proceeds of the £200,000 stock, or the company shall have the right to foreclose."

On the 24th of May the executive committee submitted this agreement to the board of directors, who empowered them to carry it into effect.

On the 31st of May, at a meeting of the board of directors, a resolution was passed for having the mortgage deed settled by the executive committee, and also the following resolutions:—

"Resolved (No. 3), that subject to the approval of the executive committee the chairman of this company be empowered to accept

for and on behalf of this company bills to the amount of £200,000, on Mr. *Lewis* depositing first-class preference stock of the *Cork and Youghal Railway* to the amount of £140,000, and *Lloyd's* bonds to the amount of £180,000, in all amounting to £320,000."

"Resolved (No. 4), that the executive committee be empowered to borrow on behalf of the company upon *Cork and Youghal Railway* first-class preference stock and *Lloyd's* bonds, amounting in the gross to £320,000, the sum of £137,000 for the purpose of effecting the loan on the *Cork and Youghal Railway* stock, £137,000, being increased by the sum of £123,000 to be paid by Mr. *Lewis* as deposit on the 4000 shares taken by him in the *Land Credit Company of Ireland*, and the first bonus on the transaction; and that the chairman of this company be empowered to accept for and on behalf of the company such bills of exchange as the executive committee may find necessary for carrying out the above objects."

On the 2nd of June the executive committee approved of the draft of the deed for effectuating the arrangement, and on the 3rd the committee passed a resolution, "That the chairman be directed to accept bills in accordance with the resolution No. 3, passed at a meeting of the board held on the 31st of May, in exchange for the securities named therein, or acceptances *pro ratâ* for the securities."

The mortgage deed recited that *Lewis* was entitled to all the stock and shares of the *Cork and Youghal Railway*, amounting to the nominal sum of £365,000, and was also entitled to the mortgages and debentures of the company, amounting to £131,000, and that the company had raised £180,000 on *Lloyd's* bonds. *Lewis* then, among other things, covenanted to assign the stock, shares, mortgages, debentures, and *Lloyd's* bonds to the *Land Credit Company*, or nominees for them.

The deed was executed by *Lewis* on the 3rd of June, 1864, and on the following day, at a meeting of the committee, it was delivered to the committee, and the chairman accepted bills drawn upon the company by *Lewis* to the amount of £200,000, the form of acceptance being:—

"Accepted for the *Land Credit Company of Ireland*, payable at, &c.
"*Fermoy*, Chairman.
"*A. Oliphant*, Secretary.

Or "Accepted on behalf of, &c."

L. JJ.
1869
In re
LAND CREDIT COMPANY OF IRELAND.
Ex parte
OVEREND, GURNEY, & CO.

Lewis at the same time handed over some of the securities which he was to deposit. The minute of this meeting was as follows:—

"The resolution passed at a meeting of committee held on the 3rd of June as to the acceptance of bills was read, and pursuant thereto the chairman of the company accepted the necessary bills. Mr. *Lewis* thereupon exchanged the securities agreed upon against the bills, which were deposited with the bankers, the *London Bank of Scotland*."

On subsequent days, down to the 9th of August, other bills were accepted by the chairman and handed to *Lewis*, who made further deposits of securities, but very little attention appeared to have been paid to the particulars of what he deposited. Thus, instead of the £140,000 first-class preference stock which, according to the resolution No. 3 of the 31st of May, he was to deposit, he only deposited £108,400, and of the £180,000 *Lloyd's* bonds £175,000; and the subsequent deposits were still more defective.

The securities which *Lewis* thus handed over had been deposited by him as security with *Overend, Gurney, & Co.;* and in order to deposit them with the *Land Credit Company* he arranged with *Overend, Gurney, & Co.* for that firm to give them up, and take in exchange some of the bills given him by the *Land Credit Company. Overend, Gurney, & Co.* thus became holders of these bills to the amount of £158,000, which it was now sought to prove.

On the 7th of June, 1864, at a meeting of the board of directors, the proceedings at the above-mentioned meetings of the executive committee were approved; and at a meeting of the board on the 14th of June the common seal was directed to be affixed to *Lewis's* mortgage deed. It did not appear to have been called to the attention of the board that *Lewis* had not deposited all the securities which he ought to have done.

In November, 1864, various discussions took place at the board meetings as to the bills, and it appeared from the minute-book that the bills were treated as liabilities of the company, and that arrangements were made for retiring some of the bills by means of the *Lloyd's* bonds which had been deposited; and in June, 1865, the board ordered delivery of some of the securities to *Lewis* on

his taking up some of the bills. On the 1st of July, 1865, a winding-up order was made.

The Master of the Rolls considered that the chairman had authority to accept the bills; that there was nothing to shew that *Overend, Gurney, & Co.* knew of his failing to enforce the condition as to the deposit of the securities, and that in the absence of such knowledge they were not liable for irregularity in the mode of performing an act which was *intrà vires*, and must be admitted as creditors.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for the official liquidator, in support of the appeal:—

These bills were obtained by the fraud of *Lewis*, and *Overend, Gurney, & Co.* had notice of the fraud. But apart from that, the bills were accepted by procuration, and whoever takes a bill so accepted does so at his peril. He must see that there is authority to accept, and that the agent is following the terms of that authority: *Attwood* v. *Munnings* (1); *Alexander* v. *Mackenzie* (2); *D'Arcy* v. *Tamar, &c., Railway Company* (3). Here the authority was conditional on the deposit of securities; they were not deposited; the condition, therefore, not being complied with the authority did not arise.

[Their Lordships desired Counsel for the Respondents to confine themselves to the second point.]

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Lindley*, for *Overend, Gurney, & Co.*:—

The cases cited on the other side only prove what hardly needs authority—that the holder of a bill accepted by procuration must prove that there was authority to accept. Here there was authority to accept. The act of the chairman was *intrà vires*, and that being so, a *bonâ fide* holder for value is not affected by collateral matters. He has a right to presume *omnia rité esse acta*: *Royal British Bank* v. *Turquand* (4), which is recognised in *Commercial Bank of Canada* v. *Great Western Railway of Canada* (5); *Bargate* v. *Shortridge* (6);

(1) 7 B. & C. 278.
(2) 6 C. B. 766.
(3) Law Rep. 2 Ex. 158.
(4) 6 E. & B. 327.
(5) 3 Moo. P. C. (N.S.) 295, 313.
(6) 5 H. L. C. 297, 318.

L. JJ. 1869 — *In re* LAND CREDIT COMPANY OF IRELAND. *Ex parte* OVEREND, GURNEY, & CO.

Fountaine v. *Carmarthen Railway Company* (1); *Ex parte Eagle Insurance Company* (2); *In re Blakely Ordnance Company* (3); *In re Barned's Banking Company, Ex parte Contract Corporation* (4); *Smith* v. *M'Guire* (5); *Stagg* v. *Elliott* (6); *Smith* v. *Hull Glass Company* (7).

Mr. *Martineau*, in reply.

SIR C. J. SELWYN, L.J.:—

This is a motion by way of appeal from an order of the Master of the Rolls, allowing the claim made by Messrs. *Overend, Gurney, & Co.* to rank as creditors of the *Land Credit Company*.

The motion has been based upon two grounds—the first being the statement on the part of the Appellants that Messrs. *Overend, Gurney, & Co.*, or the partners in that firm, must be considered as having had either notice, or, as it was termed in the course of the argument, constructive notice, of the circumstances under which the bills in question were issued. The term "constructive notice" is one which is scarcely applicable to the facts of the present case. It was somewhat withdrawn in argument; and it was said, that although Messrs. *Overend, Gurney, & Co.* might not have had actual or even constructive notice of the circumstances under which the bills were issued, still, that what they had done was equivalent to a wilful shutting of their eyes to the circumstances of the case; and that but for their own wilful blindness they would have had cognizance of all the facts.

Now it is obvious that a charge of that kind casts upon those who make it the burthen of establishing it in evidence. In my judgment the Appellants have not discharged themselves in the least degree of that burthen. It is true, that in this case there are a series of lamentable transactions which cannot be justified on any principles of commercial morality or prudence; but at the same time, if we look to the probabilities of the case, we find that Messrs. *Overend, Gurney, & Co.* were at this time the holders of securities of more or less value, to the possession of which they

(1) Law Rep. 5 Eq. 316.
(2) 4 K. & J. 549, 560.
(3) Law Rep. 3 Ch. 154.
(4) Law Rep. 3 Ch. 105.
(5) 3 H. & N. 554.
(6) 12 C. B. (N.S.) 373.
(7) 11 C. B. 897.

had an indisputable right; and it certainly requires a strong case to shew that persons in that position would, without any assignable motive, give up the securities which they actually possessed, in order to obtain, by means of a fraud of which they were cognizant, other securities which, as men of business, they must have known would be rendered entirely worthless by that fraud. That is the improbability with which we have to start; and when the evidence brought forward in support of the charge was examined, it crumbled away at every step. It would be a mere waste of time to go through the evidence in detail, because there is nothing to bring home to Messrs. *Overend, Gurney, & Co.* notice of the facts. It is true that they were perfectly well aware that dealings were going on with respect to the affairs of the *Cork and Youghal Railway Company*, and that they knew Mr. *Lewis's* affairs to be in a very unpromising position; but there is in my judgment an entire want of evidence that they knew that there was fraud being committed as between Mr. *Lewis*, Lord *Fermoy*, and the company, or what was the nature of it, or that by means of any such fraud they were to obtain the bills in question.

The second question is, whether these bills were so accepted as to be binding upon the company by whose chairman they were accepted, and by whose secretary they were counter-signed? With reference to that it is material to consider, in the first place, the nature and objects of the company on whose behalf these bills were accepted. We find from the memorandum and articles of association that the objects of the company may be said to have been, as regards trade and business, almost unlimited. [His Lordship here read the principal objects of the company as defined by the memorandum, referring particularly to the unqualified power to accept and indorse bills.]

Such being the almost unlimited objects of the company, the powers which are given to the board of directors are almost equally unlimited. The directors are to manage the affairs of the company, and, amongst other things, it is provided by the 68th clause of the articles that "no person except the directors and the managers, and other persons thereunto expressly authorized by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to make, accept, or indorse

L. JJ. 1869

In re LAND CREDIT COMPANY OF IRELAND. *Ex parte* OVEREND, GURNEY, & Co.

any promissory note or bill of exchange." Then, among the general powers which are given to the directors by clause 86, is the power "to accept and indorse bills" without mentioning any qualification. The 105th clause gives to the directors an equally unlimited power of settling what the quorum necessary for the transaction of business was to be.

Now we have to enter upon the consideration of the question of the validity of these bills, bearing in mind that this was a company one of the express purposes of which was the indorsing and accepting bills. The company, being a mere abstraction in itself, must necessarily act through some agency, and we find that the agency established by the articles is that of a board of directors, on whom almost unlimited authority is conferred. Under these circumstances such cases as *Attwood* v. *Munnings* (1) and *Stagg* v. *Elliott* (2), though they are no doubt binding authorities with reference to the circumstances under which bills of exchange given under authority may be considered as duly given, have very little bearing on the present case, when we consider that these are bills of exchange accepted by and on behalf of a company and the agents of a company such as I have described.

To ascertain the law applicable to such a matter we must first look to the *Companies Act*, 1862. It is prescribed in the 47th section of the Act, that "a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company." The question still remains, who is properly to be considered a person acting under the authority of the company, and that matter, I think, has been settled by the several decisions to which reference has been made, the effect of which is very concisely and clearly summed up by the present Lord Chancellor in *Fountaine* v. *Carmarthen Railway Company* (3). His Lordship says (4): "In the case of a registered joint stock company all the world, of course, have notice of the general Act of

(1) 7 B. & C. 278.
(2) 12 C. B. (N.S.) 373.
(3) Law Rep. 5 Eq. 316.
(4) Ibid. 322.

Parliament, and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (1), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord *Campbell's* judgment in *Royal British Bank* v. *Turquand*." That case of *Royal British Bank* v. *Turquand* may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned.

Applying, then, those principles to the present case, if, when an act within the scope of the powers of the board of directors is done by them, or (which is the same thing) is ratified and adopted by them, a person contracting with the directors is not bound to see that certain preliminaries which ought to have been gone through on the part of the company have been gone through, still less, in my judgment, are innocent holders of a negotiable security bound to inquire whether those preliminaries have been observed. In the present case, moreover, we may say that, supposing that *Overend, Gurney, & Co.* were bound to inquire and had inquired into the proceedings of the board of directors, and had examined the books of the company, they could not have discovered that every preliminary had not been observed. I think that a short examination of the books of the company would be found enough to decide this question:—[His Lordship read the resolutions of the 31st of May, and the form of acceptance of the bills, observing that nothing turned upon the minute variation that some of the bills were accepted "for the company" and some "on behalf of the company."]

The first resolution which I have just read having been passed by the general board of directors on the 31st of May, there was a

(1) 6 E. & B. 327.

L. JJ.
1869
In re
LAND CREDIT COMPANY OF IRELAND.
Ex parte OVEREND, GURNEY, & Co.

meeting of the executive committee on the 3rd of June, at which it was resolved "that the chairman be directed to accept bills in accordance with the resolution No. 3, passed on meeting of the board, held on the 31st of May, in exchange for the securities named therein, or acceptances *pro ratâ* for the securities." No doubt, as has been urged on behalf of the Appellants, that was, to a certain extent, a departure from the terms of the original resolution, which merely provided for the issuing of the bills to the full amount upon the receipt of securities, also to the full amount mentioned in the original resolution. But as this resolution of the executive committee, and the subsequent one of the 4th of June, were adopted and ratified by the board of directors on the 7th of June, they must, in my judgment, be treated as if they were resolutions of the general board. On the 4th of June there was another meeting of the executive committee, with regard to which there is this minute: "The resolution No. 1, passed at a meeting of committee held on the 3rd of June, as to the acceptance of bills, was read, and pursuant thereto the chairman of the company accepted the necessary bills. Mr. *Lewis* thereupon exchanged the securities agreed upon against the bills, which were deposited with the bankers, the *London Bank of Scotland*." Then, at a general meeting of the board, which appears to have been very numerously attended, on the 7th of June, those resolutions of the meetings of the executive committee were approved and confirmed. Under those circumstances the bills were all issued. They have come into the hands of persons whom we have held to be innocent holders of these negotiable securities. Those bills were all regularly entered in the books of the company as being bills for which the company were liable. There is a long series of meetings, which I will not occupy the time of the Court by going through, at which from time to time questions arise respecting these bills, the number of the bills, the amount, and the circumstances, were brought to the attention of the meetings, not of the executive committee only, but of the general board of the directors to whom those very large and almost unlimited powers had been given by the articles of association. Resolutions were passed dealing with some portions of them, some were paid, some were renewed, but the largest portion of them remained outstanding, and are held as

to the great bulk of them by the Respondents. It appears to me, under those circumstances, that it is no longer competent to the persons who represent this company to say that bills accepted as these were, and ratified as they were, are now to be held invalid because one of the preliminaries, or, as it was called, a condition, was not in express terms complied with, that is to say, that the whole amount of securities, or the whole rateable amount of securities, was not obtained at the time when each portion of these bills was issued. To put the case I suggested to counsel in argument. Suppose a person had come to the board of directors proposing to exchange a certain amount of securities for bills of exchange, and that he had represented the amount of the securities which he held as being £100,000, whereas in fact those securities only amonnted to £50,000, or comprised £50,000 worth of forged securities, and that the board had expressly directed the chairman to accept bills and give them in exchange for those securities, could it be said that the bills in the hands of innocent holders were to be invalidated because the board was so deceived? It appears to me that in substance this case is the same, and that innocent holders of the bills ought not to be held responsible for the neglect of duty on the part of the directors. The directors had an opportunity of examining the securities—they were brought to their attention—and if they did not examine them, but ratified what Lord *Fermoy* had done without sufficient inquiry, then it appears to me, the question being whether the innocent holders or the persons interested in the company should suffer for the default, the loss must fall upon those whose agents were guilty of the default. Whatever question may arise as between the persons interested in this company, the shareholders and creditors and directors of this company, with respect to the mode in which the authority given to the directors has been exercised, I think the innocent holders of these negotiable instruments cannot be affected by any such question, and, consequently, I think the judgment of the Master of the Rolls is right, and that this appeal motion must be refused with costs.

SIR G. M. GIFFARD, L.J.:—

The proof which has been admitted on the part of *Overend, Gurney, & Co.* has been objected to upon two grounds: first, that

L. JJ. 1869

In re LAND CREDIT COMPANY OF IRELAND. *Ex parte* OVEREND, GURNEY, & Co.

Overend, Gurney, & Co. were not innocent holders; and, secondly, that the company were not bound by the acceptance of the bills, which was an acceptance by procuration.

Now, first, as regards *Overend, Gurney, & Co.* not being innocent holders. It was urged that the transactions between the directors and Mr. *Lewis* were such as ought not to have been entered into; that they were very imprudent transactions, and transactions such as no person dealing with a business of that sort ought to have thought of for one moment. To that I quite accede. But when it is sought to affect *Overend, Gurney, & Co.* with a knowledge of the impropriety of these transactions, all you have is the evidence of Mr. *Stevens*, a document (Exhibit, O. 9) which came from *Overend, Gurney, & Co.'s* possession, and a letter from Mr. *John Henry Gurney* to Mr. *Edmund Gurney*, of the 24th of November, 1864. *Stevens'* evidence amounts to no more than this, that he went, and, as he says, "explained the transaction," to *Overend, Gurney, & Co.*—that is to say, he told them that if they would hand over some securities which they had, they would have in return certain bills of exchange drawn by Mr. *Lewis* upon, and accepted by, the *Land Credit Company*. I do not think that from that, or from the document O. 9, which, it may be observed, is dated after the last of these transactions had taken place, or from the letter of the 24th of November, 1864, we should be justified in imputing to *Overend, Gurney, & Co.* knowledge of any impropriety in these transactions. In point of fact, the transaction as regards them was the simple and ordinary transaction which was very likely to take place, and does take place, day after day, when bill brokers hold securities, and it is desirable that bills should be taken and the securities handed over. That part of the case, therefore, I think, signally fails.

Then as regards the other part of the case: first of all, what we have to deal with is a company formed under the recent statute by a memorandum and articles of association. [His Lordship read the 47th section of the *Companies Act*, 1862, as to bills of exchange.] The memorandum of association states that one of the purposes of this company is to accept and indorse bills, and shews it to be a company acting in mercantile transactions of every description. The articles are to the same effect, and the 68th

clause of the articles is in these terms:—[His Lordship read the clause.] I can have no hesitation in saying that it was not necessary for the directors to pass any resolution in order to make the acceptance of bills binding on the company, or in saying that if the directors met together and the chairman, with their knowledge, accepted a bill of exchange, that would bind the company. In the same way, if a bill of exchange had been accepted by the chairman without due authority, and the directors afterwards, at a meeting, knowing that the acceptance had been given and dealt with, acted on the footing that the bill had been properly accepted, I should not have the least hesitation in saying that the acceptance would bind the company. I might almost leave the case there, for it is clear that in the month of June, and even after the month of June, this board of directors—whether you call it a board, or whether you call it a committee—certainly a sufficient number of directors, who met together from time to time, knew perfectly well that these bills had been accepted, knew perfectly well that these bills had been handed over, and knew perfectly well that securities of some sort or other had been taken for these bills. Then it is said that they did not know that the exact terms of this resolution of the 31st of May had not been complied with. I do not hesitate to say that I do not think it could, when the original resolution was passed, have been the intention of the directors that the holder of these bills should be bound to inquire and to see that the terms of the resolution had been complied with. If such an obligation is to be imported into the transaction, you must come to this conclusion, that no person taking any of the bills from this body, part of whose business it is to deal in bills, could be safe unless he not only ascertained the terms of the resolution, but also ascertained (I do not see how you could stop short of saying he must ascertain the fact, it would not be enough to ask the question) that the particular securities specified in that resolution had been handed over.

I ask what is the reason and justice of the case? If there is default on the part of the executive of the company in observing the preliminaries, is it reasonable that the innocent bill-holder, who can have no control over those preliminaries, should be made to suffer? Ought not rather the company to suffer, as the default has

L. JJ.
1869
In re LAND CREDIT COMPANY OF IRELAND.
Ex parte OVEREND, GURNEY, & Co.

been committed by agents selected by them, whom the bill-holder would expect to do their duty as agents, and to see that everything was rightly and properly done. Moreover, I do not look on those resolutions as being a special authority excluding the acceptance of a bill of exchange except on the terms of receiving the securities. I think that those resolutions authorize the acceptance of the bills as one thing, and that the receiving the securities in exchange for the bills was another and a different and collateral thing; and unless that meaning is put on those resolutions, they are resolutions upon which it was impossible to act. If the first of those resolutions be taken literally, the bills must all be drawn at once, and all must be accepted at once, and none must be parted with until the whole £320,000 of securities was received; but it was out of the question that such a transaction as this could be carried out otherwise than piecemeal. I do not hesitate to say that I am satisfied (for the convenience of mankind requires us to take a reasonable and practical view of transactions of this nature) that under resolutions such as these, if there is an acceptance *modo et formâ*, and by the person pointed out by the resolutions, it is not to be deemed incumbent, even on persons who have notice of the resolutions, to inquire whether the particular consideration mentioned in them was received. The fact of the person who is the agent accepting and parting with the acceptances is, in point of fact, an assurance by that person that he has done all that is required to be done by him on behalf of the company who employed him—an assurance on which the person who deals with the company not only may safely rely, but must of necessity rely, otherwise the business of companies of this description could never be carried on. I do not think it necessary to refer to the case of *Royal British Bank* v. *Turquand* (1), or *Bargate* v. *Shortridge* (2), or *Fountaine* v. *Carmarthen Railway Company* (3). I think it is quite enough to put the case simply upon this: that the acceptance of the bills was a transaction plainly within the powers of the company, that it was a transaction plainly within the powers of the board of directors, that the fact that these bills were accepted and handed over was perfectly well known to the board of directors, and that whether

(1) 6 E. & B. 327. (2) 5 H. L. C. 297.
(3) Law Rep. 5 Eq. 316.

L. JJ.
1869
In re
LAND CREDIT COMPANY OF IRELAND.
Ex parte
OVEREND, GURNEY, & Co.

it was assented to by them with or without knowledge as to the securities which were taken, is, in my opinion, quite immaterial. There was, at all events, a representation to the public by the agents of the company who were instructed to carry out this transaction that everything was rightly done; and I am of opinion that it does not lie in the mouth of the company to assert that what was so represented to be rightly done was not carried out according to the precise terms specified in that which, if, in point of fact, it was a limitation of authority at all, was not a limitation of authority intended to be communicated to the public, or to have any effect as between the company and the public.

For these reasons I am of opinion that this motion must be dismissed with costs.

Solicitors: Messrs. *Jones, Roberts, & Hale;* Mr. *H. Gover.*

In re MERCANTILE TRADING COMPANY.

STRINGER'S CASE.

L. JJ.
1869
April 26, 27, 28.

Company—Winding-up—Order upon a Contributory or Director to repay a Dividend improperly declared—Companies Act, 1862, *ss.* 101, 165—*What amounts to an improper and delusive Dividend—"Profits in Hand."*

The Court has summary power, under the 101st and 165th sections of the *Companies Act*, 1862, to order a contributory or director to repay a dividend declared and paid under a delusive and fraudulent balance sheet.

In re Royal Hotel Company of Great Yarmouth (1) disapproved of.

But the balance sheet of a company engaged in a hazardous trade will not be considered delusive and fraudulent merely because an estimated value was put upon assets of the company which were then in jeopardy and were subsequently lost, or because the company was obliged to borrow money to pay the dividend, provided the facts fairly appeared on the balance sheet and the balance fairly represented profits.

A company was formed under the *Companies Act*, 1862, for running the blockade during the civil war in *America*. The articles provided that dividends should not be paid except out of profits, and that the directors should declare a dividend as often as the profits in hand were sufficient to pay £5 per cent. on the capital, subject to the resolutions of a general meeting. In

(1) Law Rep. 4 Eq. 244.

L. JJ.
1869
STRINGER'S CASE.

1864, a dividend was declared and sanctioned at a general meeting, and subsequently paid, upon a balance sheet in which a debt due from the *Confederate* government, and cotton in the *Confederate States*, and also ships engaged in running the blockade, were estimated at the full nominal value. All these assets were lost, and the company was wound up:—

Held, that as the estimate was made *bonâ fide*, and the facts appeared truly in the balance sheet, the balance sheet was not delusive, and the dividend must be considered to have been made out of profits, although the company had actually to borrow the money to pay it.

The order of *Malins*, V.C., affirmed, but on different grounds.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of the *Mercantile Trading Company, Limited.*

The company was registered under the *Companies Act*, 1862, on the 27th of June, 1863. The objects of the company, as stated in the memorandum of association, were the purchase of goods and ships for export and transmission to *America*, for sale or barter and return and sale of goods from thence, and the chartering or freighting of ships, and all other matters necessary for carrying on the operations of the company, or other operations of a similar character. It was, however, admitted that the real object of the company was to trade with the *Confederate States of America*, by running the blockade then maintained by the government of the *Federal States*. For this purpose they provided a line of ships running from *Bermuda* to *Charleston* and *Wilmington*, which were intended to carry goods from *England* to the *Confederate* government, and to bring back cargoes of cotton in return.

The company had a nominal capital of £150,000, of which about £112,000 had been paid up. The articles of association embodied the rules given in Table A of the *Companies Act*, 1862, which provide, in Rule 73, that "no dividend shall be payable except out of the profits arising from the business of the company, except so far as modified by the articles;" and the articles provided, by Article 5, that "the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of £5 per cent. on such capital, subject to the resolutions of a general meeting of the company called with reference thereto."

Shortly after the establishment of the company, the directors entered into a contract with the *Confederate* government, under which the *Confederate* government agreed to be co-owners of the ships employed by the company, and that the ships should be owned in the proportion of two-thirds by the *Confederate* government, and one-third by the company; the ownership of the *Confederate* government to be paid for in cotton, at *Charleston* or *Wilmington*, on the basis of 6*d.* per pound for "*Middling Upland*" cotton.

Several successful trips were made by the ships, and although some of them were captured or lost, a considerable profit was at first made by the company on their adventures. In May, 1864, a balance sheet was made out of the state of the company, down to the 29th of February, 1864, showing a profit of £42,718 15*s.* 2*d.*, out of which the directors proposed a dividend to be paid at the rate of £25 per cent. on the capital, amounting to about £28,000. This dividend was adopted by a general meeting of the company, held on the 17th of May.

The balance sheet was submitted to the directors of the *Agra and United Service Bank*, the company's bankers, and was examined by their accountants. The bank then advanced them upwards of £21,000 towards the payment of the dividend to the shareholders, although their account was already overdrawn to the amount of £5000. The dividend received by Mr. *E. P. Stringer*, the managing director, in respect of his shares, amounted to £3560.

The termination of the civil war in *America*, by the success of the *Federal* government, caused the failure of the company, the cotton appropriated to them in the *Confederate States* being all destroyed or captured, and the debt due from the *Confederate* government turning out worthless. The company was accordingly wound up, the only creditor of large amount being the *Agra and Masterman's Bank*, which had succeeded to the business of the *Agra and United Service Bank*. The present application was made by the official liquidator to obtain a repayment by Mr. *Stringer* of the dividend received by him, on the ground that the balance sheet was delusive, and the dividend really paid out of the capital of the company. The sections of the *Companies Act*, 1862,

L. JJ. 1869 STRINGER'S CASE.

under which it was contended that the Court had jurisdiction to order the return of the money upon this application, were the 101st and 165th (1).

The principal objections made to the balance sheet were as follows:—First, that the directors had taken credit for a sum of £51,589 due to the company from the *Confederate* government as an asset of the company at its full value; secondly, that they had also taken credit for cotton within the *Confederate States*, which was all subsequently destroyed, at the value of £17,000; and, thirdly, that they had entered the loss of three ships as a loss of only one-third of their value, thus reckoning the guarantee of the *Confederate* government for the other two-thirds at its full value.

The Vice-Chancellor was of opinion that the dividend declared was altogether delusive, and that it amounted to a return of one-third of the capital to the shareholders; but he also held that he had no jurisdiction under the 101st or 165th sections of the *Companies Act*, 1862, to make an order for the return of the dividend;

(1) Sect. 101. "The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made in manner in the said order mentioned of any moneys due from him, or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act, and it may, in making such order, when the company is not limited, allow to such contributory, by way of set-off, any moneys due to him, or the estate which he represents, from the company, on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit."

Sect. 165. "Where in the course of the winding up of any company it appears that any past or present director, manager, official, or other liquidator, or any officer of such company, has misapplied, or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just."

but that it was necessary for the official liquidator to file a bill for that purpose (1). The official liquidator appealed from this decision.

(1) 1869, March 22. The opinions expressed by the Vice-Chancellor respecting the delusive character of the dividend are sufficiently referred to in the judgment of Lord Justice *Selwyn*. The portion of His Honour's judgment which related to the jurisdiction of the Court under the *Companies Act*, 1862, was as follows: — Being on the first point entirely with the applicant that this is a dividend most improperly made and a return of one-fourth of the capital, the next question is, have I power under the Act of Parliament, in this summary manner, to make an order upon the shareholders, and Mr. *Stringer* in particular, the managing director, to return it. Now, against Mr. *Stringer*, the case is rested upon two sections, the 101st section and the 165th section. I will consider the 165th section first, because it is the most clear, and if it could be applied to Mr. *Stringer*, it would relieve the Court from the necessity of having recourse to the 101st section. Now, the 165th section is in these terms:—[His Honour read the section and continued:—] Now, having very carefully considered the arguments addressed to me, and examined all the authorities which have been cited, I feel bound to come to the conclusion that this section can have no application unless the act complained of is a wrongful act towards the company itself. Mr. *Glasse* said, it was called the delinquent directors' clause. In the margin it is called "Power of Court to assess damages against delinquent directors and officers." In this sense this is a delinquency, undoubtedly, for a company to declare dividends out of profits which it has not made, and being bound to pay only out of money in hand, to borrow money for the purpose. But I am of opinion, looking at the wording of this section, that it must be delinquency towards the company at large. Now, was this a delinquency or improper act towards the company? That cannot be, because it was the declaration of a dividend when profits had not been made, in which every shareholder equally participated; therefore no shareholder can, possibly, in this case, say that Mr. *Stringer*, as managing director, has been guilty; he cannot say that towards the company he has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or that he has been guilty of any misfeasance or breach of trust, within the words of this section, towards the company itself.

But it is said that this section gives the power either to a contributory or a creditor. No doubt, there are many cases in which, although there has been delinquency towards the company, the company itself may not feel inclined to take advantage of it, and then it gives the right to a contributory or a creditor. But it seems to me that before the right to the contributory can arise it must be a delinquency towards the company; but, if the company itself be a participator there is an end of any right to apply against the particular director who may have been the most active in taking that step.

Then is there any instance in which a creditor can complain of it if a contributory cannot? The case of *Cardiff Preserved Coal and Coke Company* v. *Norton* (Law Rep. 2 Ch. 405) was one where the complaint came from contributories. I think *Turquand* v. *Marshall* (Law Rep. 6 Eq. 112) was a bill

L. JJ. 1869 STRINGER'S CASE.

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the Appellant:—

The declaration of the dividend was both in violation of the articles and delusive, amounting to a return of part of the capital.

---

filed by shareholders. *Shipman's Case* (before Vice-Chancellor *Giffard*, on Dec. 7, 1868) was an application under this section by the *Agra and Masterman's Bank* itself. Why was that? Because Mr. *Shipman*, having been their manager, had, in gross violation of his duty, used the money of the company for his own private speculations, and had caused losses thereby, and therefore it came strictly within the words of the section, that he had misapplied or retained in his own hands moneys belonging to the company; and accordingly, upon the application of the company, he was ordered to pay the money which had been lost by his conduct, amounting, I think, to more than £30,000. [His Honour also referred to the observations of Lord Justice *Turner* in *In re Bank of Gibraltar and Malta* (Law Rep. 1 Ch. 74) and proceeded:—] I put this case upon the broad ground that the act complained of being one of the company at large, the individual director or manager who happens to participate in it cannot be made liable under this section. I am, therefore, compelled, though with very great reluctance, to refuse the application as far as regards the 165th section.

Mr. *Cotton* also relied upon the 12th section, and he said that this was, within the meaning of the 12th section, a diminution of capital. But, looking at the terms of that section, I think that it must apply to a formal diminution of capital, not to a diminution of capital by an improper declaration of dividend; if that were to be the construction of the Act there is hardly a company in which it might not be argued that the officers, and those connected with the company, had improperly paid out of the capital a dividend. In my opinion, the 12th section has no application to a case like the present.

Then the only remaining section relied upon is the 101st, and that section is in these terms:—[His Honour read the section and continued:—] Now, this appears to me to be directed to the case of debtors to the company in the ordinary sense of the word. If you go through the ledger you find *A.*, *B.*, *C.*, and *D.*, and so forth, indebted to the company; the account being settled, the object of this section is to enable the Court to make a summary order upon the debtors of the company, in the ordinary sense of the word, to pay that debt. But I cannot see that it can have any application to a case like this, where the whole thing is founded upon a breach of duty in making a dividend at a time when I may well assume that these gentlemen believed themselves justified in making it, but which subsequent events shewed they were not justified in doing, and when, as men of prudence, they were bound to know that the circumstances did not afford any justification for making the dividend. The case of *Evans* v. *Coventry* (8 D. M. & G. 835) will, probably, at the present time, be applied to such a case. *Evans* v. *Coventry* was decided upon bill, it was not decided upon this summary application, and I think I am fortified in the conclusion at which I arrive, that none of these sections will apply to the case now before me, by the circumstance that there are very numerous cases which have been going on for years past, in which dividends have been from time to time

11 Sc. 11 Jur. N.S. 916-8 11 W.R. 3 Jur. N.S.

Table A. of the *Companies Act*, 1862, which was adopted by the company, forbids payment of dividend out of capital, and the 5th clause of the articles is still further restrictive, providing that the dividends are to be paid out of "profits in hand." So far was the company from having profits in hand that they were obliged to borrow part of the money to pay the dividend from the *Agra and Masterman's Bank*. But the balance could not be called profits in any sense until it was known whether the cotton in the *Confederate States* and the debt of the *Confederate* government could ever be realized. The directors were not justified in putting a value upon what they could not realize, and which it was very doubtful whether they would ever be able to realize. At all events, the value put upon these items was much too high. No cotton in the *Confederate States* or liability of the *Confederate* government bore such a high price in the market at that time as was put upon these items in the balance sheet.

If, then, this dividend was improperly paid to the shareholders, this Court must have power to recover it: *Evans* v. *Coventry* (1); *Turquand* v. *Marshall* (2); *Kearns* v. *Leaf* (3); *Maclaren* v. *Stainton* (4); *Macdougal* v. *Jersey Imperial Hotel Company* (5); *Corry* v. *Londonderry and Enniskillen Railway Company* (6). It is not necessary to file a bill. The Court can give complete relief in the winding-up. This power has been repeatedly recognised: *In re Cardiff Coal and Coke Company* (7); *Cardiff Preserved Coal Company* v. *Norton* (8); *Shipman's Case, In re Agra and Masterman's Bank* (before Vice-Chancellor *Giffard*, on Dec. 7, 1868); *In re London and Provincial Starch Company* (before Vice-Chancellor *James*, on April 22, 1869). There is a remedy under the 101st section of the *Companies Act*, 1862; but if not, the case comes under sect. 165. This section does not apply only to a breach of

---

declared; but this is the first time, I believe both sides agree, in which an application has been made under this summary jurisdiction for a return of the dividend so paid. I am reluctantly compelled to come to the conclusion that none of the sections apply to the case, and I am therefore unable, in this shape, at all events, to make the order which is asked for.

(1) 8 D. M. & G. 835.
(2) Law Rep. 6 Eq. 112.
(3) 1 H. & M. 681.
(4) 3 D. F. & J. 202.
(5) 2 H. & M. 528.
(6) 29 Beav. 263.
(7) 11 W. R. 1007.
(8) Law Rep. 2 Ch. 405.

L. JJ. 1869 STRINGER'S CASE.

trust of which the shareholders could complain, but if the articles are violated in a way which prejudices the creditors, the creditors must have a right to complain. The only question is, whether funds have been abstracted from the coffers of the company which ought to be brought back into them.

Mr. *Glasse*, Q.C., and Mr. *H. M. Jackson*, for Mr. *Stringer*:—

There is nothing in the articles to render this dividend improper. The 5th clause does not mean that the directors were only to pay profits out of money at their bankers. They were to estimate the profits in the usual mercantile way, that is, by valuation of the assets of the company. This was done; there was no concealment on the balance sheet, and it was submitted to the *Agra and Masterman's Bank*, who understood all the circumstances, and would not have advanced the money unless the balance sheet had been honestly made. And yet they are the very parties who are now, through the official liquidator, complaining of it. At that time the prospects of the *Confederate* cause and the security of the government were thought good by most mercantile men, and it is not right to judge of the fairness of the transaction by the result of the speculation.

But we also contend that the summary jurisdiction of this Court under the *Companies Act*, 1862, does not apply to a case of this kind, where there is no breach of trust, and there are questions of great difficulty to be tried; but only to cases where the facts and equities are undisputed; *In re Royal Hotel Company of Great Yarmouth* (1); *In re State Fire Insurance Company* (2).

Mr. *Cotton*, in reply.

SIR C. J. SELWYN, L.J.:—

This case has been conveniently divided by the learned Vice-Chancellor into two separate and distinct points. He says in his judgment: "Being on the first part entirely with the applicant that this is a dividend most improperly made, and a return of one fourth of the capital, the next question is, have I power under the Act of Parliament in this summary manner to make an order upon

(1) Law Rep. 4 Eq. 244. (2) 1 D. J. & S. 634, 642.

the shareholders, and Mr. *Stringer* in particular, the managing director, to return it?" I think it is convenient to take the second of those two questions first, for it is a question involving very important considerations with respect to the practice of the Court, and it is also one of very general application. It appears that different opinions upon it have been entertained by different Judges in this Court, and, under those circumstances, it appears to me to be the duty of this Appellate Court to form and express its own opinion as speedily, as clearly, and as decisively as possible upon that question. This is a question which has been agitated more or less almost ever since the passing of the first Winding-up Act in the year 1848, but the power which was given by the old Winding-up Act is expressed in it in a very much less stringent and comprehensive form than the clauses which appear in the Act of 1862. But even under the old Winding-up Act this summary jurisdiction was very frequently and usefully exercised. I believe that one of the earliest instances of its exercise was in the case of the *Madrid and Valencia Railway Company* (1), which was wound up before Master *Blunt*, and where very large sums of money had been misappropriated by the directors of the company, and in the course of the winding up of the company, but without any bill being filed, proceedings were taken to enforce the restitution of that money by the directors, and, as appears by the report of the case, some of those proceedings before the Master were brought before Lord Justice *Knight Bruce* when Vice-Chancellor, and approved of by him. Another case, which came before another Judge of great eminence, Sir *James Parker*, is the case of *Carpenter* v. *Weiss* (2). In that case the directors had employed moneys belonging to the company in purchasing the shares of the company. There, without bill filed, proceedings were taken, and it came before the Master, who was then the Judge of first instance, for the purpose of recovering those moneys. The Vice-Chancellor says in his judgment (3): "If the act now complained of had been done by these gentlemen at their own instance, I cannot entertain a doubt that the Master would have properly charged them under the Act on the present proceedings." That is, upon summary proceedings which had been

(1) 15 Jur. 597. (2) 5 De G. & Sm. 402.
(3) 5 De G. & Sm. 414.

L. JJ. 1869

STRINGER'S CASE.

instituted without any bill. He goes on, however, to say, "The vice of the Master's order lies in this, that it assumes that the five individuals where there is no cheque forthcoming, or three of them where there are cheques, are the parties who, as between the persons signing and the company, are solely and ultimately chargeable with the moneys misapplied." And he then says that he thinks there was that which, in substance, was a valid objection for want of parties. That case appears to me to be of importance in two respects, first, as shewing the clear opinion of so eminent a Judge as Sir *James Parker*, that in such a case the Master had jurisdiction without any bill being filed; and, secondly, that in those summary proceedings every objection is just as open to the person sought to be charged as it would have been if a bill had been filed. I need not multiply instances of the exercise of this summary jurisdiction; another is found in *In re Direct East and West Junction Railway Company, Ex parte Johnson* (1). But it is perfectly true that notwithstanding those proceedings and those opinions so expressed by several Judges, a doubt as to the propriety or the competency of the Court to exercise this jurisdiction was very frequently expressed by the late Lord Justice *Turner*. The matter very seldom came before him without his taking the opportunity of saying that in his judgment such proceedings were, if not unlawful, at all events inexpedient, and I believe that it was in consequence of the doubt so frequently expressed by that eminent Judge that the clauses were introduced into the subsequent Act of Parliament, and made so comprehensive and stringent as they now are. We find them expressed in the most wide and general terms. It is true they are permissive, but the proceedings are to be taken under the authority of the Court. They are to be taken by the official liquidator, who is the officer appointed by the Court, under the advice of solicitors appointed with the sanction of the Court, and under those circumstances I think it may be assumed that proceedings so instituted would be properly conducted, that is to say, that they would be so conducted as to afford to the persons sought to be charged a full knowledge of all the points of the case intended to be brought against them, and would give to them the fullest opportunity of defending themselves in any legitimate

(1) 1 Jur. (N.S.) 913.

way; and the able counsel who have argued this case on behalf of Mr. *Stringer* have entirely failed (although requested by the Court to do so) to point out any substantial difference or disadvantage in the position in which the present Respondent, Mr. *Stringer*, stands from that which he would have occupied if a bill had been filed containing the same statements as those found in the affidavit filed by the official liquidator, and concluding with a prayer in the precise words of the present notice of motion. The summary power which has been given by the recent Act of Parliament has been very frequently exercised; and in a case before the Master of the Rolls, the *Cardiff Preserved Coal Company* v. *Norton* (1), there is a very strong expression of his Lordship's opinion as to the propriety of such proceedings, for he there says (2): "It is said that the shares taken by them in exchange from the *Crown Company* belong to and form part of the assets of the *Cardiff Company*. If this be so, the proper mode of getting at the assets of the company in the hands of contributories is by a proceeding in the Court in which the company is being wound up." That was in the Court of Bankruptcy, which, under the peculiar circumstances of that case, was the Court having the conduct of the winding-up. Therefore, that amounts to an expression of opinion by the Master of the Rolls that a bill was not the proper proceeding in such a case, but a proceeding in the Court of Bankruptcy under the winding-up. It appears that this power has been very recently exercised, particularly in *Shipman's Case*, which came before the Lord Justice when Vice-Chancellor, and still more recently in a case mentioned at the Bar, the *London and Provincial Starch Company*, but which has not yet been reported, decided by Vice-Chancellor *James*.

Under these circumstances it appears to me that we should be doing something which is entirely inconsistent with the provisions of the Act of Parliament, so general as they are, if we were to introduce any such qualification as that said to have been laid down by the Master of the Rolls in the case of the *Royal Hotel Company of Great Yarmouth* (3). His Lordship is there reported to have said (4), "Where there is really a question to be tried, then I do not think this 165th section enables you to dispose of it in this

(1) Law Rep. 2 Eq. 558.
(2) Ibid. 563.
(3) Law Rep. 4 Eq. 244.
(4) Ibid. 248.

L. JJ. 1869

STRINGER'S CASE.

way;"and, again (1), he says, the Court "can only do so in plain and straightforward cases where there is no point of law to be determined." Considering the great accuracy of the present *Law Reports*, one is very much disinclined to doubt that those are the words of the Master of the Rolls; otherwise, having regard to what I have always understood to be his own opinion upon this subject, and to his own decision in the case to which I have referred of the *Cardiff Preserved Coal Company* v. *Norton* (2), I could not help thinking that there must be some error in that report. However that may be, I feel bound to say that I do not think there is to be found, either in the words of the present Act of Parliament or in the conclusion which is justly to be drawn from the decisions upon this subject, any such qualification or limitation as that which is there expressed by his Lordship; and if we were so to hold in all these cases we should be inducing the person against whom the charge is made to endeavour to make out that there was some question to be tried, or that the matter was not so plain or straightforward as it was represented to be; and there are very few cases indeed in which some such attempt as that might not be made with some reasonable hope of success. The result would be to occasion the necessity for a double mode of proceeding and unnecessary expense and delay.

Applying, then, these observations to the present case, and assuming, with reference to this part of the case, that the Vice-Chancellor was right when he said that "this was a wholly delusive and improper dividend—in effect, a return of one-fourth of the capital, and a return of capital in violation of every rule of propriety, a return of capital in violation of the general provisions of the Act that dividends are not to be declared out of capital, and, above all, an extraordinary violation of their own rule which prescribes that they are not to pay dividends except out of profits," or, as it is more concisely put in another passage in the same judgment, that "this is a dividend most improperly made, and a return of one-fourth of the capital"—under those circumstances, has this Court jurisdiction under the 101st and 165th sections of this Act to order the return of money so improperly paid without the necessity of having a bill filed? In my judgment, there is no

(1) Law Rep. 4 Eq. 249. (2) Law Rep. 2 Ch. 405.

doubt that the Court has that power under either of these sections; for under the 101st section, under the circumstances stated by the Vice-Chancellor, can it be doubted that the amount of such a dividend so improperly paid, of capital so improperly expended, would be "a sum of money owing from the contributory" who receives it to the company within the terms of that section? If so, there is under the Act of Parliament the clearest authority without bill filed to order a return of the money so received. The 165th section is, if possible, even clearer. That is, in particular, the section which was framed in this very comprehensive form in order to obviate the doubts expressed by Lord Justice *Turner*. [His Lordship read the section.] There is no such limitation to be found in the words of either of these sections as is reported to be considered as included in them by the Master of the Rolls in the case of *In re Royal Hotel Company of Great Yarmouth* (1); but, on the contrary, the Court is empowered to examine into the conduct of the director, and that necessarily implies deciding the question whether he has been guilty of any misfeasance or breach of trust, and therefore there would be a question to be tried in every such case. It is open to the Court to examine into his conduct, to compel him to repay any moneys so misapplied, or to contribute such sums by way of compensation as the Court shall think fit. It appears to me that if we had now to draw a clause in the widest and fullest manner it would be very difficult to conceive anything more large or comprehensive than the words of the 165th section. Under these circumstances, it appears to me that if this was a wholly delusive dividend, and an improper return of capital, this money so received by the managing director of the company in respect of that delusive and improper dividend, and in respect of that improper return of capital, would be a sum of money for which the managing director would be accountable, and which, consequently, the Court might, under this jurisdiction, order him to refund. I must therefore entirely differ, though most respectfully, from the conclusion at which the learned Vice-Chancellor has arrived upon this part of the case, and I consider that in so doing I am acting in accordance with a long series of authorities in this Court.

(1) Law Rep. 4 Eq. 244.

L. JJ. 1869 STRINGER'S CASE.

There remains, however, the question upon the merits of this case, and that question may be shortly stated thus:—Whether the dividend of £25 per cent. which was declared and paid by the directors in this case is to be considered, as the learned Vice-Chancellor has considered it, so wholly delusive and improper, or, in substance, such a return of capital, as to justify the Court in any jurisdiction in making Mr. *Stringer* pay the amount of £25 per cent. on the nominal value of the shares standing in his name. Now, I quite agree with the argument which has been addressed to us on behalf of the official liquidator to this extent, that the Act which confers on these companies the privilege of limited liability imposes upon them at the same time certain conditions which they are bound to observe, and which may be considered as the price of that privilege; and if it is made to appear that for the purposes of fraud, or for any other improper motive, a company has declared and paid a wholly delusive and improper dividend, and has thereby in effect taken away from its creditors a portion of the capital which was available for the debts of those creditors, I entertain no doubt that the Court would have full jurisdiction, and would exercise it by ordering the repayment of the money so improperly paid. But in the present case we have to consider whether this dividend was, in truth, a dividend declared under such circumstances. I think that (having regard to the amount of the balance) we may dismiss from our consideration some of the minor items upon which considerable discussion has arisen. The substantial question in the case depends upon the consideration of three items in this account. Those are, first, the ships which were actually lost; secondly, the debt due from the *Confederate* government; and, thirdly, the cotton which was in the *Confederate States* at the time when the balance sheet was made out. It is very material to observe in this case that no fraud on the shareholders can be, or is attempted to be, alleged in argument, because in this case a full and fair dividend was declared, and was paid, or intended to be paid, to all the shareholders equally without any preference or priority. Neither was there any fraud upon the public intended or practised, nor even upon that part of the public who might be expected to become purchasers of the shares, because it is admitted that the shares

of this company were not sold at all, but were held from the beginning to the end by the same persons. Neither is it, I think, possible to say with justice that any attempt has been made in this case to commit any fraud upon the creditors, for though it appears at the time when this balance sheet was made out that a very large debt was owing from the company to the *Agra and Masterman's Bank*, and that a very large debt is still owing to that bank from the company now being wound up, it does not appear (with the exception of one claim recently made by a creditor at *New York*) that there are now any other debts existing at all against this company. The singularity of this case is, that the balance sheet discloses on its very face, when it first begins to deal with the profit and loss, the names of the four ships which had been lost. So, also, with respect to the debt due from the *Confederate* government. The experience which we have unfortunately had in this Court of this sort of statement put forth by companies shews how very easy and how very common it is to dissemble in their balance sheets, and instead of setting forth the real truth of the transactions with respect to their assets, debts, and liabilities, we find that where there is an asset of a doubtful character it is mixed up with others that are good in such a manner as to render the one undistinguishable from the others. Here the debt owing from the *Confederate* government is plainly stated as being a debt owing from that government. It stands by itself, and is not attempted to be dissembled or cloaked in any way. In like manner, with respect to the third item, the cotton in the *Confederate States*, nothing would have been easier than to mix up the cotton in the *Confederate States* with the larger amount of cotton which appears to have been either on the way or actually in *England;* but so far from that being the case, an amount of cotton to the extent of £17,000 is plainly stated upon the face of this balance sheet as being cotton in the *Confederate States* as distinguished from cotton in *England* or on the way. Then this balance sheet containing these plain and fair statements is actually produced to the principal creditors of the company, who had very large dealings with the company, who had several accounts with the company, who had advanced them money generally and upon special undertakings and securities, and who had the fullest knowledge of

L. JJ. 1869 STRINGER'S CASE.

all the transactions of this company. It was produced to those creditors for the purpose of inducing them to advance a still larger sum; and what renders this matter still more singular is, that it was in order to induce them to lend this sum for the express purpose of paying this dividend; so that this application, which is substantially an application made at the instance of the *Agra and Masterman's Bank*, is an application which asks the Court to treat as delusive and improper that dividend which was, in fact, made and paid with the money advanced by the *Agra and Masterman's Bank*, and advanced by them with full knowledge, or with the means of knowledge, of all the transactions of the company, and which was money advanced for the very purpose of paying this dividend, for it appears that a new account was opened with the bank, intituled "The Dividend Account."

The question with respect to the dividend is mainly rested upon the provisions in Table A. in the *Companies Act*, 1862, with respect to the payment of dividends, and the 5th article of this company, which qualifies and adds to the rule laid down in Table A. The expression in Table A. is in the negative form, "That no dividends shall be payable except out of the profits arising from the business of the company." The 1st clause of the articles provides "that all the articles of Table A. shall be deemed to be incorporated with and to apply to these articles and the said company as near as may be and circumstances will permit, except as hereinafter modified or altered." Then the 5th clause says, "That the directors shall declare a dividend on the subscribed capital of the company as soon and as often as the profits of the company in hand are sufficient for payment of a dividend of £5 per cent. on such capital, subject to the resolutions of a general meeting." I agree again with the argument which was adduced by the official liquidator to this extent, that if it could be shewn that this dividend was declared in fraud either of the negative provisions of Table A. (which is incorporated with the articles of this company) or in fraud or violation of the provisions of their own articles, so far as they relate to the creditors, namely, the 5th article, it would be then a matter which this Court would be competent to set aside, and all moneys paid in respect of such dividend ought to be returned. But the first question we have to determine is, whether

the conclusion at which the learned Vice-Chancellor arrived with respect to this matter is correct, which I think is shortly summed up by him in his judgment, in these words: "It was obvious to all the world that the consumption of life and property in the war was such that it must necessarily come to an end within a reasonable time, be it one, two, or three years, and the company, according to my judgment, could only then for the first time ascertain whether its operations had been profitable or unprofitable." Now if the learned Vice-Chancellor is correct in that view of the case, it puts an end to any further consideration of the question with respect to future profits or profits in hand; because it is obvious that according to that view of the case there could be neither profits nor profits in hand until the termination of the war, and until all the operations had been concluded, because he says until that time it could not be ascertained whether the operations of the company had been profitable or unprofitable. I think, in order to test the soundness of that conclusion, we may take, for instance, the figures which appear in Mr. *Stringer's* affidavit, and assume that by reason of the successful voyage of some of these ships the two sums mentioned of £32,000 and £24,000, making in all £56,000, had been actually realized and received in respect of profit upon adventures and cargoes actually landed and sold, and suppose that no ship had been lost at all, still the whole of the ships belonging to this company would be subject to the very hazardous adventure in which they were engaged; they had cost more than £100,000, and they were liable to destruction at any time, and, according to the Vice-Chancellor's view, until the war was determined and the safety of those ships was ascertained, it could not be ascertained whether the transactions of the company had been profitable or unprofitable. Therefore, in that view of the case, even if the company had had this sum of £56,000 in their hands in respect of realized profits, inasmuch as they would be subject to the possible loss of the value of the ships, no dividend could be paid by the company. Having regard to the provisions of Table A. and clause 5 of the articles, which contains no negative words at all, in my judgment the company would have been perfectly justified at that time, in the case I have assumed, in declaring a dividend out of the profits so received, provided that they had

L. JJ. 1869

STRINGER'S CASE.

put a fair—and no more than a fair—value upon the ships and the assets which they actually had. Taking it one step further, and assuming the case that several of the ships had been lost, that the company was bound to put down, as they did put down, their proportion of that loss as being a loss upon this balance sheet, the other two-thirds of the loss were to be covered by the responsibility and guarantee of the *Confederate* government, and according to the view of the learned Vice-Chancellor, inasmuch as until the end of the war the value of that guarantee could not be ascertained, no dividend could be declared. I confess I am unable to agree with that view. I think that under those circumstances the company was fully justified in putting a value on the ships and on the *Confederate* debt; and inasmuch as it is clear that, having regard to the extremely hazardous nature of the operations in which the ships were engaged, no insurance of them could be effected, the valuation of the ships became a matter of mere estimate; and inasmuch as with respect to the value of the obligation on the part of the *Confederate* government, there could be no fixed principle on which it could be valued—for it depended upon the views which different persons might take, and we know well what different views were taken by very eminent persons with respect to the probable conclusion of that great struggle—I think the company was justified in doing that which, in truth, is done in almost every business, namely, taking the facts as they actually stood, and forming an estimate of their assets as they actually existed, and then drawing a balance so as to ascertain the result in the shape of profit or of loss. If, indeed, it could be shewn that that estimate had been made in any fraudulent way with any intention or purpose of deceiving any one, or that, in point of fact, anyone was deceived by it, very different considerations would arise. I have already shewn that no fraud was intended or attempted against either the shareholders, or the public, or the creditors of the company. If we were to lay down as a rule that there must be actually cash in hand, or at the bankers of the company, to the full amount of the dividend declared, we should be laying down a rule which, in my judgment, would be inconsistent with what I understand and believe to be the custom of all companies of this description, and also inconsistent with mercantile

usage, and we should be laying down a rule which would open the door to and encourage a very great amount of litigation, because there are very few dividends indeed which would not be open to more or less question if such a rule as that were laid down. I think that in the absence of any fraudulent intent as against the shareholders, or as against the creditors or the public, the Court ought not to be astute in searching out minute errors in calculation, in an account honestly made out and openly declared; especially as in the present case, where the account was submitted to, and the dividend consequent upon it was ratified, by the general meeting so long ago as 1864, long before the winding up of this company, and more especially where, as here, that account is now attempted, after that lapse of time, to be impeached substantially at the instance of persons to whom all the items of the account were fully and fairly made known, who themselves were the principal actors in, and mainly assisted in the payment of the very dividend they now seek to impeach.

I think, therefore, for these reasons, that the claim originally made against Mr. *Stringer* fails upon the merits, and that the application which was made in the Court below ought to have been then, and must be now, refused with costs, and I think also that the present appeal must be dismissed with costs. That, therefore, will be the terms of our order; but, in accordance with our usual practice, we shall leave to the decision of the Vice-Chancellor any question which may arise as between the official liquidator and those whom he represents with reference to the costs so ordered to be paid by the official liquidator.

SIR G. M. GIFFARD, L.J.:—

If I could have concurred in the view which the Vice-Chancellor has taken of the construction of the articles of association, and with the conclusion at which he has arrived,—namely, that what has been done in this case amounts to a return of capital, I should not have hesitated to say that the Court had clear jurisdiction, not only under the 101st section against any contributory, but under the 165th section as against any director. I think that those clauses were introduced in order that by means of proceedings under the Act, without any double process or double

L. JJ. 1869 STRINGER'S CASE.

set of proceedings, complete justice might be done between the parties, and a complete winding-up effected; and I think the instances are rare in which the jurisdiction ought not to be exercised. No doubt there are some cases (as for instance, where you have parties concerned some of whom are not amenable to the jurisdiction of winding up, and it is not right and just to have a piecemeal litigation) when it is proper that a bill should be filed. There may also be some very rare instances where it may be necessary to have the facts stated upon the record, but wherever upon notice of motion, and upon affidavit, and due examination of witnesses, you can properly arrive at a conclusion, I can see no reason whatever why a bill should be filed. It only adds to the expense,—upon notice of motion, and affidavits, and examination of witnesses complete justice can be done—the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and, what is more important, there are the same means of hearing in the Court below, and the same means of appeal to this Court and to the House of Lords. Therefore, I can see no reason why any narrow construction should be put upon the Act, and I think it would be to the disadvantage of the public that a narrow construction should be put upon it.

Now, with regard to this case, the first important matter that we have to consider is the effect of these articles of association, and I quite agree that if the effect of these articles was that you could have no division of dividends until all the transactions were wound up, that you could have no legal dividend except out of what is termed profits in hand, there might be a great deal to be said in this case; but if we look at the articles of association as compared with Table A., it is clearly manifest that the articles of association amount to nothing of the kind. [His Lordship then referred to the provisions in Table A., and in the articles of association, which have been before mentioned, and continued:—] I have no hesitation in saying—especially if you compare the word "may" in Table A., and the word "shall" in the 5th clause, and consider that there are negative words in Table A., and that there are none in this clause—that this clause was intended simply to have this effect, and no other, viz., that when the directors had in their hands profits they should not be able to set them aside for a contingency fund, and

that they should then, at all events, be compellable to make a dividend. It did not prevent their making a dividend; but I agree, it must be out of profits, although those profits were not profits in hand.

Then, when we come to the facts themselves—I will not again go through them, for they have been considered at very considerable length, not only in argument, but also by my learned brother—it was not argued or suggested, nor could it be argued or suggested, that it was intended that this thing, though in terms a dividend, should cover what was not really a dividend transaction. The mode in which the matter was done was fair enough. The books were put into the hands of an accountant, calculations were made, and a certain conclusion was arrived at. True it is, no doubt, that these proceedings were full of risk; but although, on the one hand, there might be a great loss everyone knows that whenever there was a success the profits were something very enormous, and upon the balance sheets as taken from the books it did appear that there was a profit of £42,000, and it was proposed out of that to divide somewhere about £28,000, the profits, I agree, not being profits in hand. The fault that is found with that is, that the estimate was an erroneous estimate; that too sanguine a view was taken of the prospects of success; and that there ought to have been a very much less sum put upon the face of this balance sheet as assets than really was put there. But I do not think that anyone can say it was not at this date possible for honest persons carrying on this trade, entertaining the view which they did entertain as to their prospects, honestly to make out such a balance sheet as this, and honestly to believe that those were profits fairly divisible between them. As I have said before, this was not done in any underhand manner; the whole thing was patent and open; it was known, or capable of being known, by every shareholder, and if the directors of the *Agra and Masterman's Bank* did not know anything about it, they neglected their duty, and behaved most shamefully to their own shareholders whose money they lent; for the balance sheet was put in their hands, and they had accounts of every description, and they must have known perfectly well that it was neither more or less than a blockade-running company;

L. JJ. 1869 STRINGER'S CASE.

the very nature of the accounts shewed it; and so far from there being any concealment, the balance sheet itself was put into the hands of the auditors, and no person who knew what the business of the company was could look through that balance sheet without seeing at once that the full value was put upon the *Confederate* government debt, and that the four ships had been lost, and without knowing at once that if things turned out adversely that which was profit might, from subsequent events, become a great loss. Again, this dividend was declared in May, 1864, and was actually paid in June, 1864, and I cannot forget that it was actually paid by the *Agra and Masterman's Bank*, who not only advanced the money, knowing the affairs of the company, but who paid the dividends through the medium of cheques drawn upon them by the shareholders. I think it would be a gross injustice if at this distance of time, when a dividend has been made and paid in this way so long ago as the year 1864, because things turn out adversely afterwards, and the company is wound up in 1867 at the instance of a creditor, such a dividend should be repaid. I quite agree when there has been what can be termed fairly a misappropriation of assets as against a creditor, that creditor has a right in the winding-up to have those assets recouped; but I cannot think that such a dividend as this was in any sense a misappropriation as against either the *Agra and Masterman's Bank* or any other creditors, or that it was in any sense delusive, or in any sense a fraudulent transaction, or that it was any other transaction than this, viz., that mercantile men who were engaged in adventures which might result in very great or even total loss, and which might also result in very great profit, took a sanguine view of what the value of the assets was, looking at what at that date was the actual profit made, and acted upon that *bonâ fide*, not intending to defraud in any way any person whatever.

Therefore, I am of opinion that this appeal must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the Respondent: Messrs. *Uptons, Johnson. & Upton.*

In re ESTATES INVESTMENT COMPANY.

PAWLE'S CASE.

L. JJ.
1869
April 16.

Company—Winding-up—Contributory—Fraudulent Prospectus—Laches.

Eleven shareholders of a company repudiated their shares, and refused to pay the calls thereon, on the ground that they had been induced to become shareholders by fraudulent misrepresentations in the prospectus of the company. One of the eleven, acting in conjunction with the other ten, filed a bill to be relieved from his shares; and it was agreed between the solicitors of the company and the ten that they should not be prejudiced by their not taking proceedings pending the suit. A decree was made in favour of the Plaintiff in the suit, and was affirmed on appeal. Pending the appeal, and while the names of the ten remained on the register of shareholders, the company was ordered to be wound up :—

Held, in the case of one of the ten, that he was not liable as a contributory of the company.

The order of the Master of the Rolls affirmed.

THIS was an appeal from an order made by the Master of the Rolls in the winding up of the *Estates Investment Company, Limited.* The company was duly registered under the *Companies Act*, 1862, on the 15th of February, 1865. In May following the prospectus of the company was issued. On the 15th of that month *Henry Pawle* applied for sixty shares in the company, and paid the usual deposit on such application. On the 23rd of May sixty shares were allotted to him, and his name was entered in the register of shareholders. In June, 1865, *Pawle* discovered what he alleged to be fraudulent misrepresentations in the prospectus, and thereupon he repudiated the shares. In the same month the company commenced actions against *Pawle* and eighteen other shareholders (one of whom was *J. R. Ross*) for the recovery of calls payable on the allotment of the shares. Early in July, 1865, *Ross* instituted a suit of *Ross* v. *Estates Investment Company* for the purpose of setting aside the allotment of shares to him, and restraining the action by the company against him. In instituting this suit, *Ross* acted in conjunction with *Pawle* and at least nine of the other shareholders against whom actions had been brought, and who had formed themselves into a committee of "dissentient allottees," and who employed the same solicitor, and contributed to the payment

L. JJ. 1869

PAWLE'S CASE.

of the costs of the suit. On the 25th of July, 1865, an order was made by Mr. Baron *Martin* in eleven of the actions against shareholders (including those against *Ross* and *Pawle*) staying proceedings in all the actions, except that against *Ross*, until the action against him should be tried.

On the 22nd of December, 1865, the solicitor for *Ross*, *Pawle*, and the other shareholders, wrote to the solicitors of the company as follows: "With reference to the case of the allottees other than Mr. *Ross*, shall we understand that I need not take separate proceedings in each case, but that pending Mr. *Ross's* suit the other allottees shall not be prejudiced by not taking proceedings in each individual case?" The solicitor of the company replied on the 23rd of December as follows: "It is understood that your clients, the other allottees, are not to be prejudiced by their not taking proceedings pending the decision in *Ross's Case*."

On the 20th of November, 1866, Vice-Chancellor *Wood* made a decree in favour of the Plaintiff in *Ross* v. *Estates Investment Company* (1). On the 23rd of November the solicitor of the shareholders who acted along with *Ross* wrote the company's solicitors as follows: "Will you be good enough to inform me whether you will accord to my clients other than Mr. *Ross* the same result that has been obtained by Mr. *Ross* in his suit without the necessity of separate proceedings in each case?" On the same day the company's solicitors replied:—

"*Ross* v. *Estates Investment Company*.

"Dear Sirs,

"We are instructed to appeal against the decision of the Vice-Chancellor in this case. Until the result of the appeal be known we cannot, therefore, furnish you with the information for which you ask."

On the 26th they also wrote: "We omitted to add to our letter of the 23rd instant that, of course, the directors will not proceed with any of the actions against your clients pending the appeal in *Ross's Case*."

On the 16th of March, 1867, an order for winding up the company compulsorily was made on the Petition of the secretary of the company.

(1) Law Rep. 3 Eq. 122.

On the 20th of July, 1868, the decree of Vice-Chancellor *Wood* was affirmed by the Lord Chancellor (1).

No proceedings were ever taken by *Pawle* to have his name removed from the register of shareholders, and the question on this adjourned summons was whether he should be settled on the list of contributories. It was admitted that if he had filed a bill against the company before the commencement of the winding-up, he would have had the same title to be relieved from his shares as *Ross* had.

Under these circumstances the Master of the Rolls was of opinion that *Pawle's* name ought to be removed from the list of contributories, and the official liquidator appealed from this decision.

Mr. *Roxburgh*, Q.C., and Mr. *Higgins* (Mr. *Southgate*, Q.C., with them), for the Appellant:—

We contend, in the first place, that there was no agreement binding the company to submit to the result of *Ross's* suit, for there is nothing to shew that the letters were authorized by the company. Inthe second place there was no mutuality in the arrangement, for if the affairs of the company turned out prosperously, there was nothing to prevent *Pawle* from insisting on his shares. But, even if there was an agreement binding the company, the creditors are not bound by it. *Pawle* ought to have applied to the Court as soon as the Vice-Chancellor's order had been pronounced in November, 1866; but instead of that he allowed three months to elapse without taking any steps. He is, therefore, barred by his laches: *In re Cleveland Iron Company, Ex parte Stevenson* (2). The principle of *In re Reese River Silver Mining Company, Smith's Case* (3), does not apply, and the case is governed by *Oakes* v. *Turquand* (4).

Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Everitt*, for *Pawle*, were not called on.

SIR C. J. SELWYN, L.J.:—

We do not think it necessary to trouble the Counsel for the Respondent in this case, for we have come to the conclusion that the decision of the Master of the Rolls was correct.

(1) Law Rep. 3 Ch. 682.
(2) 16 W. R. 95.
(3) Law Rep. 2 Ch. 604; 4 H. L. 64.
(4) Ibid. 2 H. L. 325.

L. JJ. 1869 PAWLE'S CASE.

Upon the part of the Appellants, reliance has been placed mainly upon the authority of the case of *Oakes* v. *Turquand* (1), decided in the House of Lords. As I have frequently had occasion to say, I not only feel myself entirely bound by that case as being a decision of the Supreme Court of Appeal, but also, if I may respectfully say so, I entirely and most cordially agree in the principles of that decision, and am not in the least degree disposed to extend any of the exceptions which may have been introduced to what was decided in that case. But, on the other hand, it has been clearly established that where persons have been induced by fraud to take shares in a company and have, immediately upon the discovery of that fraud, or within a reasonable time afterwards, repudiated the shares, entirely dissolving, so far as they could, all connection with the company, and have taken proceedings to have their names removed from the list of shareholders—in that case, although a decree may not have been actually obtained for the removal of their names from the list at the date of the winding-up order, still if such proceedings have been taken, and have been actively prosecuted, and an order has been obtained, though not amounting to a final decision or decree, upon those proceedings, the persons who are so situated are entitled to be removed from the list of contributories. Then, assuming that to be so, the question is, whether in a case of that kind, it is to be laid down as a general proposition, as has been contended on behalf of the Appellant in this case, that there must be a separate proceeding by each one of the persons who are in that position, so that they must each and all of them be Plaintiffs in a proceeding in this Court, or must make an application under the 35th section of the *Companies Act*, in order to obtain the removal of their names from the list of contributories? In my judgment it would be contrary to all the principles upon which this Court has always acted, to hold that there was any necessity for any such multitudinous proceedings, or for any such vexatious accumulation of costs as would be the result of adopting that view of the case. Of course it is open to the company, and especially to the creditors of the company, to contend, as has been contended in this case, that a mere lying by and professing to join in proceedings without taking

(1) Law Rep. 2 H. L. 325.

any active part, while it remains open to the person so professing to join to adopt a contrary course at a subsequent time, would not be a conclusive proceeding, and would not be binding upon him or the creditors. In that I entirely concur. If it could be shewn that Mr. *Pawle* had reserved to himself any such liberty, and that it was open to him to take an opposite course to that which he had taken, or that he had not been properly and *bonâ fide* a party to the proceedings which were taken, then I should have been of opinion that the decision of *Oakes* v. *Turquand* was applicable to the case. But here no such case is established.

[His Lordship then referred to the facts as stated above, and continued:—]

The question which we have to consider is, whether under those circumstances, having regard to the order which had been made by Mr. Baron *Martin*, having regard to the proceedings in Mr. *Ross's* suit, and the decree obtained in *Ross's* suit, and having regard also to the correspondence, it would have been a proper proceeding on the part of Mr. *Pawle* to have filed a separate bill. In my judgment, it would have been most improper and vexatious. The reason of his conduct was public and patent to all the world, because there was the order of Mr. Baron *Martin* coupling the action against Mr. *Ross* with that against Mr. *Pawle* and other actions, and there was no fraud, concealment, or reticence upon the subject, but the whole thing was done openly and candidly for the very object of preventing an unnecessary multiplicity of suits and a great accumulation of costs.

Under those circumstances, I think that the principle established in the case of *In re Reese River, Silver Mining Company, Smith's Case* (1) applies to this case, and it must be held that there has been no negligence or laches on the part of Mr. *Pawle*, but that he from the first, as soon as he discovered that there was fraud, repudiated these shares, that he has done nothing which is inconsistent with that proceeding, and that although he has not himself either moved to have his name removed from the list of contributories, or filed a bill, yet he has substantially made himself a party to the proceedings taken by Mr. *Ross*, though nominally in his name only, still substantially and in effect for the benefit of Mr. *Pawle*

(1) Law Rep. 2 Ch. 604; 4 H. L. 64.

L. JJ. 1869 PAWLE'S CASE.

and others, and that, consequently, Mr. *Pawle* is entitled now to say that his name should not be upon the list of contributories. For these reasons I agree with the decision at which the Master of the Rolls has arrived, and I think that this appeal motion must be refused with costs.

SIR G. M. GIFFARD, L.J.:—

The question upon this appeal is whether this case comes within the principle of the case of *In re Reese River Silver Mining Company* (1). Now, in that case there was fraud, and there was repudiation, and there were substantial proceedings for the purpose of asserting and enforcing the consequences of that repudiation. In this case also there was fraud, and there was repudiation, and the only distinction between the two cases is this, that in this case there was a suit, not by Mr. *Pawle*, but by Mr. *Ross*, for the purpose of enforcing the consequences of Mr. *Ross's* repudiation, and on the part of Mr. *Pawle* there was a correspondence between a solicitor acting on his behalf and the solicitors of the directors, that correspondence following on proceedings in actions at law, in which proceedings Mr. *Ross's* action was left to go on, but Mr. *Pawle's* action and a number of other actions were stayed in order that all those actions might abide the result of *Ross's* action. I can have no hesitation in saying that this case comes distinctly within the principle of that of the *Reese River Silver Mining Company*. Although Mr. *Pawle* was not actually the Plaintiff, that had taken place which was equivalent to his being the Plaintiff; and if we were to hold the contrary, the result would be, that in a case of this kind you would have, perhaps, five hundred suits when, for all practical purposes, one suit would be quite sufficient. I am therefore clearly of opinion that the decision of the Master of the Rolls was right, and that this appeal should be dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *Batt & Son.*
Solicitor for Mr. *Pawle:* Mr. *H. Harris.*

(1) Law Rep. 2 Ch. 604; 4 H. L. 64.

In re LONDON AND COUNTY GENERAL AGENCY ASSOCIATION.

L. JJ.
1869
Feb. 9, 10.

HARE'S CASE.

Company—Contributory—Void Amalgamation—Repudiation of Shares—Suit to set aside Amalgamation.

An agreement was entered into between company *A.* and company *C.* for amalgamation, on the terms that company *A.* should purchase the assets of company *C.*, and give the shareholders of company *C.* equivalent shares in company *A.*, and that company *C.* should be wound up voluntarily. On the footing of this amalgamation, *H.*, who was a shareholder in company *C.*, applied for shares in company *A.*, which were allotted to him, and his name was placed on the register accordingly. Shortly afterwards, *H.*, and several other shareholders repudiated their shares in company *A.* on the ground that company *C.* had no power to amalgamate with another company, and that there had been misrepresentations in the circular. The repudiating shareholders acted by the same solicitor, and one of them, *F.*, shortly afterwards filed a bill to set aside that amalgamation, and presented a Petition to wind up company *C.* A compromise was subsequently made of the suit on the terms that the amalgamation should be rescinded and the names of the repudiating shareholders should be removed from the register of company *A.* This was agreed to by both companies and sanctioned by the Judge, but the name of *H.* still remained on the register of company *A.*, and that company was also soon afterwards wound up. The agreement for compromise was signed by the solicitor acting for the repudiating shareholders, who was also the solicitor in *F.*'s suit, but there was no proof that *H.* had ever authorized him to agree to the compromise on his behalf, or to do any act in the matter, except to write a letter repudiating the shares.

Held (affirming the decision of *Stuart*, V.C.), that *H.* was liable as a contributory of company *A.*

THIS was an appeal from an order of Vice-Chancellor *Stuart* made in the winding-up of the *London and County General Agency Association, Limited*, which is subsequently referred to as the "*Association*."

The *Association* was established in November, 1862, and registered under the *Companies Act*, 1862, and by their memorandum of association their objects were defined to be, among other things, to lend money on legal or equitable mortgages, or upon any other security, real or personal, or upon all descriptions of merchandize, dock warrants, shares, &c., of other joint stock companies, or upon credit without security, and generally to transact and employ the

L. JJ. 1869 HARE'S CASE.

capital of the company in transacting any and every description of financial business whatever, either as principal or agent, and to purchase and hold shares in joint stock companies, to amalgamate with other joint stock companies of a like nature, and to do all such things as are incidental or conducive to the attainment of the above-mentioned objects.

The 93rd clause of the articles gave to the directors the entire management of the association, with power to do all things necessary for carrying on its business, and also specific powers to purchase the business and property of other companies, and to amalgamate with any company with a like object; to alter, vary, or cancel agreements or arrangements, and to settle any questions affecting the company in any way they might think fit.

In February, 1865, another company, called the *London Offices Company, Limited,* herein referred to as the "*Company,*" was formed and registered under the *Companies Act,* 1862. The objects of this company was defined to be "to purchase and sell leasehold and freehold properties available for offices or otherwise, and the doing of all such other things as are incidental or conducive to the attainment of the above objects." There was no power in the articles of association to amalgamate with any other company.

Mr. *G. Hare* was the holder of fifty shares in the *Company.* In August, 1866, an amalgamation was proposed between the *Company* and the *Association.* On the 6th of September, 1866, a circular, signed by the chairman and manager of the *Company* and by the chairman of the *Association,* was sent to the shareholders of the *Company,* informing them that the *Association* had taken over an old-established business, which made a profit of many hundred pounds a year; that the manager of the *Association,* who had formed the business, had a large interest in the *Association,* and had deposited a sum of money sufficient to guarantee for three years a dividend of £10 per cent. on the paid-up capital, though a much larger profit was to be expected; and that the business of the *Association* was of the same nature with that of the *Company.* With this circular was sent a form of application for shares in the *Association,* addressed to the directors, in the following terms:—

"Gentlemen,—I hereby assent and agree to the arrangement of transfer made between the *Company* and the *Association,* or to

such modification therein as you may consider beneficial or proper; and I request you to allot me shares of £10 each in the *Association* in lieu of the shares of £10 each held by me in the *Company:* and I hereby also request and authorize you to credit my shares in the *Association* with the amount standing to my credit in the books of the *Company*."

Hare filled up the form of application sent to him for fifty shares, relying on the truth of the statements contained in the circular.

In answer to this application fifty shares in the *Association* were allotted to *Hare*, the allotment being expressed to be made "in accordance with the amalgamation with the *London Offices Company, Limited*."

On the 8th of September, 1866, a meeting of the *Company* was held, at which a proposed basis of amalgamation between the *Association* and *Company* was approved by a majority of the shareholders present. The document which contained this "proposed basis" provided that the *Association* should assume the liabilities of the *Company* as set forth in the schedule thereto, and that the shareholders of the *Company* should receive, in exchange for their shares, shares in the *Association*.

Another meeting was convened for the 2nd of October, 1866, to confirm the resolution passed at the meeting of the 8th of September, approving of the proposed basis of amalgamation, and to appoint a liquidator for the voluntary winding up of the *Company*. The meeting was accordingly held on the 2nd of October, and the resolution of the 8th of September was confirmed; and it was further resolved, that the *Company* should be wound up voluntarily (although no resolution to that effect had been passed at the previous meeting), and two liquidators, Mr. *Wood* and Mr. *Leah*, the latter of whom was the manager of the *Association*, were appointed liquidators.

In November, 1866, *Hare* and some other shareholders in the *Company*, among whom was a Mr. *Fisher*, were advised by their solicitor, Mr. *Pulbrook*, that the amalgamation was void; and they also ascertained that the statements in the circular of the 6th of September were in great measure untrue. *Hare* stated, in his evidence, that he was not aware before this time of the terms of

L. JJ. 1869 HARE'S CASE.

the amalgamation, and that he had done no act accepting or acting on the letter of allotment.

Mr. *Pulbrook* accordingly, on the 16th of November, 1866, wrote a letter to the directors of the *Association*, as follows:—

"I am instructed by Mr. *G. Hare*, of *Sheerness*, to require his name to be at once removed from the register of members of the *London and County General Agency Association*. Certain particulars respecting the objects, &c., of the *Association*, being essentially different to those represented to him, having come to his knowledge, he has immediately instructed me on the subject. Unless his name is removed by Saturday I must apply to the Court to rectify the register by striking out his name."

Mr. *Pulbrook*, also, on the 21st of November, wrote again to the directors, calling upon them to cancel the amalgamation, and to remove from the register the names of those shareholders in the *Company* who had accepted shares in the *Association*.

On the 28th of November the directors passed a resolution, which was afterwards confirmed, "that the amalgamation be, and is hereby, cancelled on the terms contained in Mr. *Pulbrook's* letter of the 21st of November, each company being placed on the same footing as before the amalgamation took place." In December the company also, being advised that the resolution passed on the 2nd of October for a voluntary winding-up was invalid, passed fresh resolutions for that purpose, and appointed Mr. *Farmer* and Mr. *Schnodhorst* liquidators. In the meantime Mr. *Fisher*, on the 28th of November, filed a bill to set aside the amalgamation; and he also presented a Petition to wind up the company.

All this time negotiations had been going on between Mr. *Pulbrook*, on behalf of the dissentient shareholders, and the *Company*, which resulted in an agreement for compromise being entered into on the 19th of January, 1867, which was headed as follows:— "Terms of compromise between the *London Offices Company*, Mr. *Fisher*, and other shareholders, Messrs. *Leah* and *Wood*, and the *London and County General Association*, of all matters in dispute." This agreement was signed by the *Company's* solicitor, by Mr. *Pulbrook*, by the solicitors for Messrs. *Leah* and *Wood*, and by the solicitor and chairman of the *Association*. It provided, among

other things, that an order should be made on Mr. *Fisher's* Petition for continuing the winding up of the company under the supervision of the Court; and that, if necessary, a decree should be taken by consent in the suit of *Fisher* v. *London Offices Company;* and that the amalgamation should be rescinded, and the names of the shareholders who had accepted shares should be removed from the register of the *Association,* and Mr. *Pulbrook* signed this agreement "for the Petitioner, Plaintiff, and contributories."

An order was made on the Petition in pursuance of this agreement, and the compromise was sanctioned by the directors of the *Association,* who passed a resolution directing Mr. *Hyett,* the solicitor of the *Association,* to carry it into effect.

The compromise was also approved at a general meeting of the *Company,* and was afterwards sanctioned by the Master of the Rolls on the 21st of March, 1867.

On the 12th of March, 1867, a Petition was presented for the compulsory winding up of the *Association,* and a winding-up order was made on the 22nd of March by Vice-Chancellor *Stuart.* The names of the shareholders who had accepted shares in the *Association,* including that of *Hare,* were not removed from the register at the date when the Petition was presented, notwithstanding the resolution of the directors, and the official liquidator accordingly placed *Hare's* name on the list of contributories. The Vice-Chancellor having refused to remove his name, *Hare* appealed from his decision.

Hare filed an affidavit, setting forth the above-mentioned documents, and stating that he had done nothing further than signing the letter of application to accept or assent to the allotment; and that he was not aware at that time of the terms of the amalgamation; and he added: "About a month after, hearing from my solicitor the true nature of the amalgamation and the untruthfulness of the statements contained in the circular, I instructed him to write to the *Association* repudiating my allotment, and I verily believe that he did so." The affidavit did not state that *Hare* had given Mr. *Pulbrook* authority to act for him in the agreement for compromise with the *Company* and the *Association.*

Mr. *Pulbrook* also filed an affidavit, and was cross-examined upon it. In his cross-examination he said: "The terms of the

L. JJ. 1869 HARE'S CASE.

compromise of the 19th of January, 1867, were made in the suit and in the matter of the winding-up of the company. I acted for the Plaintiff, Mr. *Fisher*. I had not authority to act from each of the individual shareholders of the company. I had Mr. *Fisher's* authority."

In July, 1868, *Hare* became bankrupt, and before the appeal was heard his assignees were placed on the list of contributories in his place.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the Appellants:—

The application by *Hare* for the shares in the *Association*, and the allotment to him, were solely upon the terms of an amalgamation which was void; he was therefore never, in fact, a shareholder at all. But supposing the agreement to take shares was voidable only, and not absolutely void, *Hare* repudiated it as soon as he ascertained the facts of the case, and applied to have his name removed from the register. He was, in effect, a party to the proceedings by *Fisher*, which were taken on behalf of all the repudiating shareholders, and he was included in the terms of the compromise. Mr. *Pulbrook* acted for them all, and a separate suit by *Hare* would have been vexatious and unjustifiable: *Simpson* v. *Westminster Palace Hotel Company* (1); *Lord Belhaven's Case* (2); *Williams' Case* (3).

Mr. *Greene*, Q.C., and Mr. *Cracknall*, for the official liquidator of the *Association*:—

The agreement by *Hare* to take shares in the *Association* was not void, but only voidable; and it was the duty of *Hare*, not only to repudiate it as soon as he ascertained the facts of the case, but to take measures to get his name removed. There is no proof of his doing anything but sending the letter of the 16th of November, 1866, and it is well established that a mere protest by a shareholder will not enable him to escape liability if his name is on the register at the commencement of the winding-up. The compromise arranged by Mr. *Pulbrook* was only a compromise of *Fisher's* suit and Petition, and did not affect *Hare*, who was no party to

(1) 8 H. L. C. 712. (2) 3 D. J. & S. 41.
(3) 2 J. & H. 400.

the proceedings: *Oakes* v. *Turquand* (1); *Kent* v. *Freehold Land Company* (2).

Mr. *Brooksbank*, in reply.

SIR C. J. SELWYN, L.J., after remarking upon the unsatisfactory manner in which the case had been brought before the Court of Appeal, without a previous discussion before the Vice-Chancellor, and with imperfect evidence, continued:—

It is of great importance to maintain the principle laid down by the House of Lords in *Oakes* v. *Turquand*, and acted on by Lord *Cairns* in *Kent* v. *Freehold Land Company*. That principle has put an end to a great deal of litigation which, unfortunately, existed in these winding-up cases, and to the attempts on the part of shareholders who had contracted to take shares, and had held them until the company failed, to escape from liability on the ground of some variance between the prospectus and the memorandum, or some alleged fraud in the establishment of the company.

In this case Mr. *Hare*, who was the Appellant originally, and is now represented by his assignees, admits that he applied for shares in this *Association* which is now being wound up. It is true that that application referred to the amalgamation which had been attempted to be formed between the two companies called in the argument the *Association* and the *Company*, and was in answer to a circular issued in pursuance of that arrangement and sent to the members both of the *Association* and the *Company*. The application of Mr. *Hare* was sent in early in September, 1866, and was followed by a letter of allotment on the 1st of October allotting him fifty shares, which, it is true, also refers to the proposed amalgamation between the *Association* and the *Company*.

It may be assumed, for the sake of argument, that the amalgamation was so tainted with fraud that it would have been competent for *Hare* by proper proceedings to have set aside the whole transaction. But, on the other hand, and having regard to this letter of application signed by him, and as it was also part of the arrangement that the *Company* should be wound up voluntarily, and as

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 3 Ch. 493.

L. JJ. 1869 HARE'S CASE.

resolutions for such winding up have been made, and by the order of the 16th of January, 1867, such winding up was ordered to be continued under the supervision of the Court, it was, I think, clearly competent to *Hare*, although he had been or was a shareholder in the *Company*, to become a shareholder in the *Association*. And we find him, in fact, applying for these fifty shares, we find them actually allotted to him, and his name entered on the list of shareholders of the *Association*, and it has so remained down to the present time, and was so entered at the date of the winding up of the *Association*.

Under these circumstances, then, upon the authorities which have been cited, Mr. *Hare* had agreed to become, and had become, a shareholder in the *Association*, and the burden is cast upon him to prove that he ceased to fill that character before the date which the Act of Parliament assigns to the winding up of the *Association*, that is before the presentation of the Petition for winding up.

In the present case I think it is not necessary to define precisely what would be sufficient to divest him of the character which he then filled. But the first question we have to decide is, whether the letter of the 16th of November, 1866, which has been so much relied upon, was sufficient for that purpose. That letter is in these terms:—[His Lordship read it.] We must test this case by assuming that that letter had been written, and nothing done from the date of that letter to the winding up of the *Association*. Then this case would be precisely within the authorities to which I have referred. It would be one of the cases where a person, thinking there had been fraud in the establishment of the company, or some difference between the real objects of the *Association* and those represented to him, would be justified in applying to have his name removed from the register. But Mr. *Hare* did nothing after that. If he allowed his name to remain and did not take such proceedings as were necessary to have his name removed, he would still continue a contributory, because he was such at the winding-up; and therefore I think that that letter is in itself insufficient to amount to such a repudiation of his character of a shareholder as would entitle him, as against the creditors of the *Association*, to have his name removed from the list. Now, have we anything subsequent to that letter?

We have the affidavit of Mr. *Hare* himself, which states expressly the authority to write that letter—a limited authority. Mr. *Hare* states, it is true, that Mr. *Pulbrook* was his solicitor, but does not state that he gave him any authority, except simply to write that letter. It is clear that the affidavit carries the matter no further; but it was certainly a very singular one to be filed by a gentleman if, after this, he had authorized Mr. *Pulbrook* to enter on his behalf into another arrangement with regard to these shares. It is singular that he should state clearly the authority he gave to Mr. *Pulbrook*, and that he should fail to state the important fact that he authorized him to do something not within the ordinary scope of the work of a solicitor as such, namely, to enter into an arrangement agreeing to some new terms. His affidavit is wholly silent as to that. But the matter does not rest there, because Mr. *Pulbrook*, having made an affidavit, is cross-examined upon that affidavit. His statement is certainly not very clear, except to this extent, that he expressly says, "I had not authority to act for each of the individual shareholders. I had Mr. *Fisher's* authority." Then it is said by counsel on behalf of the Appellants, that there were a great number of these shareholders, and that all that is meant is, that he had not an authority from each one of these shareholders; but this gentleman has not been re-examined, and we can, of course, only take the statement as we find it, namely, that the client himself gave authority to his solicitor to write a particular letter, but we do not find that any such proceedings as the letter refers to were taken. We are asked to assume that Mr. *Hare* had given to Mr. *Pulbrook* authority to act for him in all these negotiations which went on between Mr. *Pulbrook* on the one side, and the *Association* on the other, and that it must be assumed that Mr. *Pulbrook* was acting as the authorized agent of Mr. *Hare*. I asked the counsel for the Appellants whether they could refer to any document in which Mr. *Hare* was concerned after the date of the letter of the 16th of November, 1866, and the answer I obtained was the only possible one, that there was no such evidence. Upon that state of the evidence, in the absence of any special or general authority to enter into any agreement respecting the shares or otherwise, there is nothing in my judgment to shew that Mr. *Hare* had deprived himself of the power

L. JJ. 1869 HARE'S CASE.

which he possessed of acting for himself and of exercising his own judgment or option either to retain the shares, or to have his name removed, as he had threatened to do. I think, therefore, upon this evidence, that such power having been reserved to Mr. *Hare*, and Mr. *Hare* having continued to hold these shares, and having been a shareholder on the list at the date of the winding-up, he has not discharged the burden cast upon him by the principle of the case of *Oakes* v. *Turquand* (1), and that he must be taken as having been a shareholder on the books of the *Association* during the whole of this time, and consequently that the names of the assignees who now represent him must remain on the list. The present appeal motion must, therefore, be refused with costs.

SIR G. M. GIFFARD, L.J.:—

It is not necessary in the present case to give any opinion as to the validity or invalidity of the amalgamation between these two companies; suffice it to say that Mr. *Hare* made an individual application to the *Association*, and that the shares were allotted to him; and, looking to the form of the application and the allotment, Mr. *Hare* might have insisted on being a shareholder. The argument was founded on this—that in point of fact he had done what put him in such a position that, at the date of the winding up of the *Association*, he could not possibly have said that he was a shareholder. The evidence does not shew or prove that. On the contrary, Mr. *Hare's* affidavit goes only to the sending of the letter of the 16th of November, 1866. Mr. *Pulbrook's* cross-examination with reference to the arrangement in January, 1867, distinctly says that he had no authority then, and although I dare say, and am willing to assume, that Mr. *Hare* was Mr. *Pulbrook's* client throughout, it is quite clear that for an arrangement of that sort an actual authority was necessary, either an authority previous to January, or, at all events, a ratification antecedently to the 12th of March. But I find nothing of that description, and nothing to induce me to think that there was authority or ratification.

Therefore, the grounds of my judgment are these:—First of all that there was a voidable contract between Mr. *Hare* and the

(1) Law Rep. 2 H. L. 325.

L. JJ.
1869
HARE'S CASE.

Association to take shares; that shares were allotted to him, and his name was on the register at the date of the winding-up; that he had done nothing except cause a letter to be written by Mr. *Pulbrook* on the 16th of November, 1866, requiring his name to be removed from the register; that his name was not removed; and further, that previously to the 12th of March, 1867, the date of the winding-up of the *Association*, there was no binding agreement as between him and the *Association* that his name should be removed. I am of opinion, therefore, that this case comes distinctly within *Oakes* v. *Turquand* (1) and *Kent* v. *Freehold Land Company* (2), and that therefore the appeal must be refused with costs.

Solicitor for the Appellant: Mr. *A. Pulbrook.*

Solicitors for the Official Liquidator: Messrs. *Ditton & Warmington.*

WHITNEY *v.* SMITH.

L. JJ.
1869
March 17, 19.

Trustee—Wilful Default—Parties to Suit for Administration—Tenant for Life and Remainderman—Decree for Wilful Default as to Income—15 & 16 Vict. c. 86, s 42—Improper Investments—Stock Mortgage—Trustee making Profit by his Office—Solicitor.

15 Ch D 49

A bill to administer the estate of a testator, charging the trustee with wilful default, was filed by a person interested in the estate in remainder, the tenants for life not being parties to the suit:—

Held, that the decree must be confined to an account of wilful default as to the capital, and that no relief could be obtained with respect to the income of the estate.

The effect of the 42nd section of the 15 & 16 Vict. c. 86, is at most to place persons served with notice of the decree on the same footing as if they were Defendants: they cannot be treated as co-Plaintiffs, and no inquiries can be obtained in such a suit for their benefit that could not have been obtained between co-Defendants.

A trustee, who was a solicitor, sold out stock forming part of the trust estate and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 3 Ch. 493.

L. JJ.
1869
WHITNEY
v.
SMITH.

also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estate for building purposes.

Held, that the Plaintiff could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business.

A trustee sold a sum of consols, forming part of the trust estate, and invested the proceeds in a stock mortgage:—

Held, that this was an improper investment.

The decree of *Stuart*, V.C., varied.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*.

Thomas Willett, by his will, dated the 26th of March, 1830, thereby gave his residuary personal estate to two trustees upon trust to sell and convert the same, and invest the proceeds in government or parliamentary stocks of *Great Britain*, or upon real securities in *England* or *Wales*, with power to vary the investments as occasion might require or as should be thought fit, and upon trust to pay one moiety of the annual income to his sister *Hannah Willett*, for life, and to pay the other moiety, and also the former moiety after the death of *Hannah Willett*, to his sister *Lucinda Stikeman*, during her life for her separate use, and after her death upon trust to raise £600 for each of the daughters of *Lucinda Stikeman*, and to stand possessed of the residue of the residuary estate in trust for all the children of *Lucinda Stikeman* who should attain twenty-one years, in equal shares. And he directed that the legacies and shares of such of the daughters of *Lucinda Stikeman* as should be living at the death of the testator, should be settled upon them for life, and after their deaths upon the children. The testator made a codicil, dated the 19th of April, 1842, whereby he appointed *W. E. Maxwell*, and the Defendant, *J. Redhead Smith*, executors and trustees of his will in the place of those previously appointed.

The testator died in January, 1847, and *W. E. Maxwell* died in January, 1848, leaving the Defendant, *J. Redhead Smith*, sole executor and trustee of the will.

Hannah Willett, the testator's sister, was still living.

Lucinda Stikeman died in November, 1863, leaving five children, namely, *Alfred W. Stikeman*, *Frederick B. Stikeman*, *John C. Stikeman*, *Lucinda Gaisford*, the wife of *William Gaisford*, and *Adelaide Eliza Whitney*, the wife of *F. A. Whitney*—all of whom were born

in the lifetime of the testator and attained the age of twenty-one years.

Mrs. *Gaisford* had no children. Mrs. *Whitney* had several children, one of whom, *Emma Gaisford Whitney*, was the Plaintiff in the suit.

The Plaintiff filed a bill for administration of the estate, in which she charged the Defendant with various breaches of trust. These were principally as follows:—

The Plaintiff alleged that the Defendant sold out a sum of £2585, £3 per Cent. Stock, at the market price of £100 12*s.* 6*d.* per cent., and invested it on a mortgage for securing the retransfer of such stock and the payment in the meantime of interest equal to the amount of the dividends; that such sale and mortgage was a breach of trust, even if the mortgage truly represented the transaction; but that, in fact, the mortgagee agreed to pay £5 per cent. on the sum advanced, and that the Defendant received that amount of interest, but only accounted for £3 per cent. to the estate. The Defendant positively denied the truth of the allegation that he had received a higher amount of interest than he had accounted for. The Lords Justices held that there was no foundation in the evidence for the charge.

The Plaintiff also alleged that the Defendant had sold a leasehold house and premises, called *Loughborough House*, for an inadequate price, and had allowed £4000, the main part of the purchase-money, to remain on mortgage of the property, and that he had afterwards permitted part of the *Loughborough House* estate to be sold freed from the mortgage, so as to have an inadequate security for the sum of £4000. The Defendant adduced evidence to shew that the price given was fully adequate, and offered to advance the sum of £4000 himself, and take a transfer of the mortgage, as he considered the security amply sufficient.

The Plaintiff also charged the Defendant with having sold out stock and invested the proceeds on mortgages, some of which were unwarranted by the terms of the will, in order that he might be employed as a solicitor in respect of such mortgage transactions, and in respect of the sale from time to time of portions of the mortgaged property, and in respect of leases from time to time to be granted thereof, and in respect of loans to builders who were

L. JJ. 1869 WHITNEY v. SMITH.

building on the mortgaged property: and that he made great profits as a solicitor in that manner, for which he ought to account to the testator's estate.

In answer to this charge the Defendant admitted that he had invested some of the trust funds on mortgages of leasehold property, which were not authorized by the will, but said that this was done at the urgent request of both tenants for life of the testator's residuary estate, and of the members of Mrs. *Stikeman's* family, who were beneficially interested therein, and that all the mortgages had been paid off and no loss of capital had resulted to the estate, and he objected to account to the Plaintiff for the income of the trust estate, for which he had accounted to the tenants for life, and in which the Plaintiff had no interest. And he denied that he had made any profits by employing or investing money belonging to the testator's estate, except such as had been received by him in respect of professional services rendered by him in investing on mortgage or other securities the moneys forming part of the said estate, and that such services had not been paid out of the testator's estate, but, in cases of mortgages, by the persons by whom the money was borrowed, and in other cases by the persons beneficially entitled under the will, by agreement between them and himself, and that he had never charged such services against the testator's estate.

The bill prayed that the trusts of the will might be carried into effect, and that in taking the accounts the Defendant might be charged with wilful default as to the testator's real and personal estate and the income thereof, and that he might be charged with the profits made by using portions of the testator's estate in his business.

The Vice-Chancellor directed the usual inquiries as to the real and personal estate of the testator, and also an inquiry what profits had been made by the Defendant in his business by the employment of any part of the estate of the testator or the proceeds thereof, and an account of all moneys and funds received by the Defendant in respect of the testator's real and personal estate, or which might, but for his wilful neglect or default, have been received; and in taking such account the Defendant was to be charged with the profits, if any, which upon the last inquiry should

appear to have been made by him, and that the Defendant should pay the costs of the suit up to the hearing.

From this decree the Defendant appealed.

Mr. *Karslake*, Q.C., and Mr. *Cookson*, for the Appellant:—

The Defendant has admitted in his answer that he invested some parts of the estate in securities not strictly justified by the terms of the will; but this was done at the express desire of the tenants for life, and no loss of capital has happened thereby. The Plaintiff, therefore, is not injured, and in this suit no charge can be gone into respecting loss of income, as the tenants for life are not co-Plaintiffs. The decree is therefore wrong in directing a general inquiry, so as to include income as well as capital. The other charges in the bill are quite unsupported by evidence, and there is no justification for the wide inquiries directed by the Vice-Chancellor's decree.

Mr. *Dickinson*, Q.C., and Mr. *Bush*, for the Plaintiff:—

This being a general administration suit, the Plaintiff is entitled by virtue of the 42nd section of the *Chancery Improvement Act* (15 & 16 Vict. c. 86), to a complete administration decree, and the tenants for life, and all other persons entitled, being served with notice of the decree, are bound by all the proceedings. The effect of that section is, that the tenants for life are in the same position as if they were co-Plaintiffs, and the decree is therefore right in directing a general account.

With regard to the profits alleged to have been made by the Defendant, the changes of investment were made, not for the purposes of the estate, or for the benefit of any of the persons interested, but in order to bring profit to himself as a solicitor. We do not charge him with using the estate in his business, or charging the estate with his services in these transactions, but with making a profit by means of his office of trustee, which no trustee is allowed to do: *Benson* v. *Heathorn* (1); *Sugden* v *Crossland* (2).

Mr. *Karslake*, in reply, cited *Pell* v. *De Winton* (3).

(1) 1 Y. & C. Ch. 326, 341. (2) 3 Sm. & Giff. 192. 2 Jur. N.S. 318
(3) 2 De G. & J. 13. 4 Jur. N.S. 228.

L. JJ. 1869 WHITNEY v. SMITH.

SIR C. J. SELWYN, L.J. :—

In this case there are three principal questions. First: Whether the Plaintiff is entitled to an account of the moneys received by the Defendant, or which, without his wilful default, might have been received by him. Secondly: Whether the Plaintiff is entitled to what he asks in the third paragraph of the prayer of the bill, namely, that in taking such account the Defendant may be charged with the profits he has made by using portions of the testator's estate in his business in the manner therein mentioned. And thirdly, the question of costs.

With respect to the first question, a very important point was raised with reference to the practice of the Court by Mr. *Dickinson* in his argument, viz. :—Whether in a case like the present, where the person filing the bill is only one of several residuary legatees, and only interested in remainder, he is entitled, under the 42nd section of the *Chancery Improvement Act,* to say that the Court must look upon the case as if it were one in which all the residuary legatees had been joined as co-Plaintiffs. That was a proposition which certainly was entirely new to me. Mr. *Dickinson* had ample opportunity of producing, if he could, an authority in support of that proposition, but he failed to produce any such authority. It appears to me to be clear that the Act of Parliament had no such intention or operation. All it says is, that it shall not be competent to the Defendant in a suit for administration of an estate to take an objection for want of parties, where the suit, being an administration suit, is instituted by one residuary legatee. The utmost extent of this is to put the parties in the same position as if the other residuary legatees had been Defendants, but it certainly does not entitle the Plaintiff in such a suit to say that all the other residuary legatees are to be treated as being co-Plaintiffs with the one Plaintiff on the record, especially in a case like the present, where the pleadings and evidence raise distinct issues between the tenants for life, who are not parties to the record, but who are, according to this contention, accounted co-Plaintiffs. I think, therefore, that there is no foundation for this argument.

That being so, the question as to wilful default is really reduced in substance to the question respecting the dealings with the

Loughborough estate. [His Lordship discussed the evidence on this point, coming to the conclusion that it entirely failed to establish the Plaintiff's case, and continued:—] So far, therefore, as the prayer refers to sums which the Defendant but for his wilful default might have received, I think that the bill ought to be dismissed.

Then, with respect to the profits, in like manner no authority has been cited in support of a proposition so wide as this—that a solicitor, who has conducted himself in the manner in which this Defendant has done, ought to be charged with profits merely because he has lent out some portions of the testator's estate upon mortgage of property which has been used for building purposes, and thus, by means of those building operations, he has been employed as a solicitor, and has made some profits. Any rights which can be enforced against the Defendant according to the ordinary practice of the Court, with respect to these loans, will be capable of being enforced under the inquiry which we propose to direct. But I think there is no foundation, upon the pleadings or evidence in this case, for such a very wide decree as that which is sought—namely, that the Defendant may be charged with the profits which he has made by using portions of the estate in his business. With respect to the investments, it is admitted by the Defendant, and has been stated several times in the argument, that some of the investments which were made, and which the Defendant represents to have been made at the request of the tenants for life and for their benefit, were breaches of trust. That is not disputed. The present Plaintiff is an infant, and, in addition to that, I think that no satisfactory explanation has been given with respect to the selling out of a portion of the trust fund and investing it upon the security of mortgages which were only stock mortgages. I think that is a transaction which certainly, so far as the evidence before us could lead us to any satisfactory conclusion, would seem to be rather for the purposes and benefit of the Defendant than for the benefit of the estate, and consequently the Plaintiff has established a right to an inquiry upon that subject; not to a decree for the profits as prayed by the bill, but an inquiry which, if, as I have already said, according to the ordinary practice of the Court, she can establish a right to recover any sums of money in respect of the investments,

L. JJ. 1869 WHITNEY v. SMITH.

will amply secure to her that right. The inquiry we propose to direct is, whether any and what sums of stock forming part of the estate have been sold, and for what amount of cash, and whether the proceeds of such sale have been invested on any and what securities and under what circumstances, and what has become of the money produced by such sale.

[His Lordship then proceeded to deal with the question of costs, as to which he said, that a great part of the costs which had been incurred were costs which it would be unjust to throw upon the estate, and that probably both parties had been in the wrong; but with regard to the charge against the Defendant of having received a higher rate of interest than he accounted for, His Lordship said:—] It is impossible to conceive a charge more direct and more offensive against any person, and especially against a professional gentleman, than a charge of that kind. In my judgment that charge has been entirely disproved, or, at all events, there is no sufficient evidence to support it. I think that the justice of the case will be met, not, as has been suggested, by throwing the costs of this unfortunate dispute upon the innocent persons or upon the estate, but by directing that there shall be no costs of the suit on either side up to and including the hearing.

SIR G. M. GIFFARD, L.J.:—

There are four questions arising on this appeal:—First, as to wilful default; secondly, as to the Defendant being charged with profits; thirdly, as to the stock mortgages; and fourthly, as to the costs of the suit up to the hearing.

As to wilful default, it is quite clear that the Plaintiff, being interested only in the capital, can have nothing to do with the income; and it is equally clear that justice would not be done to the Defendant if an inquiry were directed making him liable in respect of that, because the tenants for life are not here; and even if they had been here, the utmost that could have been done would have been to direct some inquiry as between the co-Defendants, leaving the question of wilful default entirely open. Therefore the question of wilful default is brought to one simple point, namely, as to the *Loughborough House* property:—[His Lordship commented on the evidence on this point, and said that he

was satisfied that the *Loughborough House* property had been sold for a full and fair value.]

Then as regards the profits, no doubt if trust money is laid out in such a thing as the purchase of cotton, or if it is lent out upon bills of exchange, or if it is put into a business and actually turned over and used in the business, the *cestuis que trust* are entitled, if they think fit, to an account of profits and to have the profits. But what has taken place here is this—the money has been lent by the trustee upon certain securities which probably were not securities justified by the trust. He happened to be a solicitor, and I have no doubt that the loan of that money tended to bring him custom in his profession of a solicitor. But no case has gone the length of saying that because a loan of that sort made by a trustee who happens to be a professional man, tends to bring him custom in that profession, he charging the estate nothing for his work and labour, it not being in any sense the produce of the trust estate—no case has gone to the length of saying that the *cestuis que trust* are entitled to the profits of that. I think it would be very unjust that they should be so entitled. The utmost the matter comes to is this: that he being a solicitor, the loans probably put him in the way of getting some business, and by this means conduced to his getting profits from that business. But that is not fairly the produce or profit of the trust estate, or a matter with which the *cestuis que trust* have anything to do.

Then as regards the stock mortgages, I have no hesitation in saying that under the usual powers to vary securities, a loan upon a stock mortgage is not a thing which is justified by those powers. It must not be a stock mortgage, but a mortgage in the ordinary way for securing certain fixed capital. Therefore it is right, I think, that there should be an inquiry with respect to the stock mortgages.

[With regard to the costs, His Lordship commented on the conduct of both parties and continued :—]

Justice, I think, will be fully done by giving no costs whatever to the next friend of the Plaintiff up to the hearing, and on the other hand, by not giving the Defendant any costs.

Solicitors for the Plaintiff: Messrs. *Warry, Robins, & Burges.*
Solicitors for the Defendant: Messrs. *Combe & Wainewright.*

L. JJ.
1869
May 1, 3.

LAMB *v.* NORTH LONDON RAILWAY COMPANY.

Railway Company—Lands Clauses Act—Compulsory Powers—Purposes of Special Act—Undertaking.

A railway company obtained an Act of Parliament in 1864 for extending their operations, containing compulsory powers to take additional lands in connection with their undertaking. The Plaintiff's land was included in the deposited plans referred to in the Act. It was provided by the Act that a street called *Albert Street* should not be stopped up by the company without the consent of the vestry of the parish of *Islington*. In 1865, the company, having been unable to obtain the consent of the *Islington Vestry* to the stoping up of *Albert Street*, obtained another Act for the improvement of their *Highbury Station*, and for other purposes, by which it was recited that it was expedient that the company should be empowered to stop up *Albert Street*, and also to acquire, by compulsion or otherwise, additional lands in connection with their undertaking, and the company was empowered to take the lands included in the deposited plans; and it was also enacted that they might stop up *Albert Street* provided that they made another street in a prescribed direction. None of the Plaintiff's land was included in the plans referred to in this Act.

The company, before the expiration of the compulsory powers of the Act of 1864, gave notice to the Plaintiff to take some of his land included in the plans referred to in that Act; although it was admitted that the land was wanted to form the new street under the provisions of the Act of 1865. The Plaintiff filed his bill for an injunction:—

Held (affirming the decision of *James*, V.C.), that the Plaintiff was entitled to an injunction, the stopping up of *Albert Street* not being one of the purposes of the Act of 1864.

The Court will not construe the compulsory powers of a railway company so as to extend them beyond the express words or absolutely necessary implication of the Act; it being the duty of the company to take care that the public understand, before the Act is passed, the extent of the compulsory powers which they require.

Where a railway company has given notice to take land for some object which is clearly within their compulsory powers, the Court will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land.

THIS was an appeal from an order of Vice-Chancellor *James*, granting the Plaintiff, *Francis Lamb*, an injunction to restrain the *North London Railway Company* from taking compulsorily certain lands belonging to him near the *Highbury Station* of the company, which they had given notice to take.

In 1864, the company obtained an Act for enabling them "to construct additional works at *Poplar*, and for other purposes."

The preamble recited, amongst other things, that it was expedient to empower the company to purchase or acquire, by compulsion or otherwise, additional lands and houses in connection with their undertaking.

The 6th section enacted as follows:—"Subject to the provisions of this Act and in the incorporated Acts contained, the company may enter upon, take, and use all or any of the lands and other property shewn on the plans and described in the books of reference so deposited as aforesaid; but the power of taking the same compulsorily shall not be exercised after the space of three years from the passing of this Act."

The incorporated Acts therein referred to were the *Lands Clauses Act*, the *Railways Clauses Act*, and the *Harbours, Docks, and Piers Clauses Act*, 1847, as to some of its clauses.

The 19th section provided that "Nothing in this Act contained shall empower the company to stop up or alter the present level or inclination of the public road numbered 35 A., and called *Albert Street* on the deposited plans, without the previous consent in writing of the vestry of the parish of *St. Mary, Islington*."

The Plaintiff's land now in question was included in the books of reference and deposited plans relating to this Act, and notice of the intended application to Parliament was served on him. The company could not obtain the consent of the *Islington Vestry* to the stopping up of *Albert Street;* but as they required, in order to enlarge and improve their station at *Highbury*, to take or use part of *Albert Street*, they applied for and obtained, in 1865, another Act. The preamble of this Act recited, that in order to carry out a contemplated enlargement and improvement of the *Highbury Station* it was expedient to empower the company to stop up a portion of *Albert Street*, and to appropriate the site thereof, for the purposes of their undertaking; and that it was also expedient to empower the company to purchase or acquire, by compulsion or otherwise, and hold additional lands and houses in connection with their undertaking; and that plans and sections shewing the line and levels of the proposed widening of the said portion of the company's railway, and of the proposed enlargement and improvement

L. JJ. 1869 LAMB v. NORTH LONDON RAILWAY CO.

of the bridges respectively, and of the intended new cut from the company's existing railway dock into the river *Thames*, and of the intended new road in substitution for *Grange Road*, and of the said street proposed to be stopped up, and also shewing the lands and houses which the company might purchase under this Act, together with books of reference to such plans, had been deposited with the clerk of the peace for *Middlesex*.

By the 21st section it was enacted that, "subject to the provisions in this Act, and in the incorporated Acts contained, the company may enter upon, take, and use all or any of the lands and other property shewn on the plans and described in the book of reference so deposited as aforesaid, but the power of taking the same compulsorily shall not be exercised after the space of three years from the passing of this Act."

The *Lands Clauses Act* and other general Acts were incorporated in this Act, but not the provisions of the previous special Act of 1864.

The 58th section was as follows:—"Subject to the provisions and restrictions in this Act and the Acts wholly or partially incorporated herewith respectively contained, the company also may permanently stop up and appropriate for their use portions of the street or lane in the parish of *Saint Mary, Islington*, known as *Swan Yard*, otherwise *Albert Street*, to the extent shewn upon the said plans, and the site of so much of the said street or lane as shall be so stopped up and appropriated as aforesaid shall from the time of such stopping-up and appropriation thereof respectively be absolutely vested in the company: provided, nevertheless, that the company shall have previously constructed at their cost a new or substituted road of twenty feet in width, and running from the portion thereof cut off, and lying south of the railway, to *Upper Street, Islington*, in a direction as near as may be parallel to that of the line of the railway."

The Plaintiff's land was not included in the books of reference or plans deposited with this Act, nor was he served with notice of the company's intention to apply to Parliament for it.

In May, 1867, the compulsory powers under the Act of 1864 being nearly expired, the company gave notice to the Plaintiff under those powers of their intention to take part of his land.

The Plaintiff entered into negotiations with the company, but afterwards discovered that the greater part of the land included in the notice was not wanted for any of the purposes of the Act of 1864, but for the purpose of making a new road connecting *Albert Street* with *Upper Street*, which they were compelled to do under the Act of 1865 as a condition of their stopping up *Albert Street*. The Plaintiff thereupon filed the bill in this suit, praying for an injunction to restrain the company from taking any of the land comprised in their notice, on the ground that they had no power to take any of his land compulsorily except for the purposes of the Act of 1864; and also that there was ample space for the new road on land already belonging to the company without taking any of the land of the Plaintiff.

The Plaintiff having moved for an injunction in accordance with the prayer, the motion was granted by the Vice-Chancellor, and the company appealed from his decision.

Sir *Roundell Palmer*, Q.C., and Mr. *Rodwell*, for the Appellants:—

The Act of 1865 does not comprise any lands which could be used for the purpose of making the new road ordered by that Act to be made. If the compulsory powers cannot be extended to get land for the road, neither can it be purchased by agreement. Therefore, if the Plaintiff's contention be correct, Parliament has ordered the company to do an impossibility. The preamble of both the Acts recites that it is expedient to permit the company to take additional lands "in connection with their undertaking." That shews that a narrow construction ought not to be put upon their powers. The sensible view of an Act like that of 1865 is that it enlarges the old undertaking, and does not constitute a new one. As to part of the land in our notice we are, at all events, right; and if we are to be restrained at all, the injunction should only be to restrain us from proceeding on our notice as to the part which the Court holds we cannot take. *Eastern Counties Railway Company* v. *Hawkes* (1) is in our favour. Suppose the former Act had put a stop on our purchasing land for a station, and the latter Act had removed that restriction, surely we could purchase under the powers of the former Act. What we want the

(1) 5 H. L. C. 331.

L. JJ. 1869 LAMB v. NORTH LONDON RAILWAY CO.

land for is a convenience incident to the old undertaking: *Stockton and Darlington Railway Company* v. *Brown* (1); *Warden, &c., of Dover Harbour* v. *South Eastern Railway Company* (2); *Cother* v. *Midland Railway Company* (3); *Sadd* v. *Maldon, &c., Railway Company* (4); *Railways Clauses Act*, 1845, s. 16.

Mr. *Kay*, Q.C., and Mr. *Woodhouse*, for the Plaintiff:—

Before an Act affecting the property of individuals is passed, notice is served on them. We were not served with notice of the Act of 1865, because it did not purport to affect us, and now the company seek to use it to take away our property. The work is not one which could be done under the first Act, or under the 16th section of the *Railways Clauses Act*, 1845: *Reg.* v. *Wycombe Railway Company* (5). The Act of 1865 does not extend the period of compulsory taking under the Act of 1864, which tends to shew that the Legislature did not intend the powers of the former Act to be exercised for the purposes of the latter. *Eastern Counties Railway Company* v. *Hawkes* (6) turned on contract, and is irrelevant. The *Dover Harbour Case* turned on the meaning of the words "connected with the railway." The company have land on which they could make this road, but prefer applying it to build a hotel, which they have no right to do. This deprives them of the right to take our land: *Galloway* v. *Mayor, &c., of London* (7); *Eversfield* v. *Mid-Sussex Railway Company* (8); *Flower* v. *London, Brighton, and South Coast Railway Company* (9).

Sir *Roundell Palmer*, in reply.

SIR C. J. SELWYN, L.J.:—

In cases like that which is now before the Court the burden lies upon those who seek to take the property of others against their will to shew that a compulsory power enabling them so to do has been conferred upon them by Parliament. Such powers are not to be created or extended by doubtful implication; but, as

(1) 9 H. L. C. 246.
(2) 9 Hare, 489.
(3) 2 Ph. 469.
(4) 6 Ex. 143.
(5) Law Rep. 2 Q. B. 310.
(6) 5 H. L. C. 331.
(7) Law Rep. 1 H. L. 34, 42.
(8) 3 De G. & J. 286.
(9) 2 Dr. & Sm. 330.

Lord *Cottenham* observed in the case of *Webb* v. *Manchester and Leeds Railway Company* (1), it is the duty of the Court to keep these corporations, which possess such extraordinary powers, strictly within the limits of those powers.

In the present case the Plaintiff's land is shewn on the plans and described in the books of reference referred to by the Act of 1864, but is not included in the plans, nor described in the book of reference referred to by the Act of 1865, and, in my judgment, it is perfectly clear, and, indeed, the contrary has not been insisted upon in argument, that the company could not have acquired the property of the Plaintiff under the Act of 1864; for although it is true there are no negative words contained in the 6th clause of that Act, still it has been very fairly and properly admitted by Sir *Roundell Palmer* that the company is necessarily restricted to the purposes of the Act when they use their compulsory powers for acquiring land. I think it did not require the authority of the recent case in the Court of Queen's Bench (*Reg.* v. *Wycombe Railway Company* (2)) to shew that under circumstances such as exist in the present case this company had no power to stop up the street called *Albert Street* under the general powers conferred by the 16th section of the *Railways Clauses Act*, limited as those powers are by the words at the commencement and the close of that section, and also by the express enactment of the 46th section of the same Act of Parliament. I think it is perfectly plain that they had no such power, still less had they any power to make another street at right angles with that, and running into another and entirely different road. We must therefore proceed upon the hypothesis that, under the Act of 1864, the company had no power to take or purchase against the will of the Plaintiff this land for the purpose of making any such road.

Under these circumstances, then, if the Plaintiff had been able to foresee what the company would require for the purposes of the Act of 1864, excluding from those purposes the formation of this new street, he would have known that a very small, if any, portion of his land would be required for the purposes of that Act, and he might therefore reasonably abstain from offering any opposition to the passing of that Act through Parliament. Then he receives

(1) 4 My. & Cr. 120. (2) Law Rep. 2 Q. B. 310.

L. JJ. 1869. LAMB v. NORTH LONDON RAILWAY CO.

no notice of the introduction of the Act of 1865, or of any intention to obtain from Parliament any extension of the powers contained in the Act of 1864, and it certainly would be a case of considerable hardship if a person in the possession of land over which no powers were conferred by the Act of 1864 should find himself exposed to the exercise of such compulsory powers without any notice, or any opportunity of opposing the passing through Parliament of the Act conferring those powers. Nevertheless, if such powers had been clearly given by the Legislature, whatever the hardship might have been upon any individual, it would have been our duty to carry into effect the provisions of the Act.

But the question which we have to decide is whether, in fact, any such powers have been conferred by the Act of 1865. I think it is upon the construction of that Act, having reference, of course, to the former Act, that the question before the Court turns. Now, in considering that Act of Parliament, I think there are three things which are to be observed. The first is, that the two Acts are entirely distinct, that there are no words incorporating the one Act with the other; secondly, that the second Act does not continue or extend the powers contained in the Act of 1864; and thirdly, that in the Act of 1865 there is no reference to the lands authorized to be taken by the former Act. On the contrary, the two Acts are, as I have said, separate and distinct; the powers conferred by them are separate and distinct; and the lands which the company is authorized to purchase under the Act of 1864 are quite separate and distinct from those which are authorized to be purchased by the Act of 1865. That appears in a very marked manner in both the Acts. It will be sufficient to refer to the second Act of 1865; but the observations which I make upon that apply also to the Act of 1864. [His Lordship then referred to the preamble and 21st and 58th sections of the Act of 1865, and continued:—] Now I have already said that the construction of this new or substituted road cannot be considered, in my judgment, as one of the purposes of the Act of 1864 at all; it is a matter entirely collateral to the formation of the railway; it is, in fact, the price or condition upon which, as between themselves and the public, the company were authorized to stop up and appropriate for their own use a certain portion of *Albert Street*; but

there is no express direction that they shall construct this new street, nor were any special powers given to them for purchasing the land which is necessary for its formation. Therefore, in my judgment, if Parliament had intended, for the purpose of this new street, to give powers of compulsorily taking any particular portion of land, the lands which were necessary for that purpose would have been included in the plans and in the book of reference, and also would have been stated to be lands which were to be purchased for the purposes of the Act. Of course, if such lands had been included in plans previously deposited, and if they had been comprised in the former Act of Parliament, it would have been very easy to have referred to them without the necessity of requiring any new deposit or any new description of these lands. But we do not find any such reference to former plans deposited, nor is there any incorporation of the provisions of the former Act at all. I think, therefore, this being an entirely separate and collateral thing, we must take it that Parliament meant this company to acquire, as they best might, the lands which were necessary for the formation of this road, only saying that unless they did acquire land necessary for that purpose, then the condition would not be complied with, and they would not be at liberty to appropriate to their own use that portion of *Albert Street* which, upon the performance of that condition, was to become the property of the company. I think, therefore, that the 58th section cannot be considered as either directly or indirectly conferring the power of compulsorily purchasing these lands.

An argument was also founded upon the recital in the Act of 1865, to which I have already referred. I agree with the argument that the word "undertaking" in that recital must include the whole undertaking from the commencement to the time when this Act of Parliament was passed. But I think the very collocation of the recitals that immediately follow it shews that it could not have been the intention of the Legislature to include the Plaintiff's land for the purpose of making this new road; for, adopting the argument of Sir *Roundell Palmer* upon this point, that it was intended to give them, by compulsion or otherwise, the power to obtain additional lands in connection with their undertaking, that power of obtaining by compulsion these additional lands is one of the express purposes of that Act of 1865. Then

L. JJ. 1869 LAMB v. NORTH LONDON RAILWAY CO.

the recital goes on to say that the lands which are to be acquired, and which the company may purchase under this Act for those amongst other purposes, are described in the plans and books of reference; and those plans and books of reference do not include the Plaintiff's land. Therefore I think there is no sufficient ground for saying that by means of that recital, or otherwise, any such power can be implied. I think that the company have failed in shewing the existence in either of these Acts of Parliament of any power enabling them compulsorily to purchase the Plaintiff's land.

The consequence is, the appeal motion must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

There were certain subordinate points adverted to in the argument upon this case which I will just touch upon before going to the real questions which arise on this appeal. It was alleged that because the company had some other land which they might apply to this purpose, and were building, or proposed to build, a hotel upon it, therefore the Plaintiff was entitled to the injunction. I am quite satisfied that would have afforded no ground for interfering provided this land was actually being taken for the purposes for which the company might lawfully take it. Again, it was argued that the notice included some land which was taken for lawful purposes, and that the notice was separable, and that, at all events, the injunction ought not to prevent that land from being taken, or, at least, that certain terms ought to be imposed on the Plaintiff. Now, in the first place, there is no distinction made in the notice; it applies to certain specified lands without any distinction whatever. Secondly, I cannot understand how one part of the notice can be taken and the other disregarded, or how it can be separable. The fact is, that when the notice is given it is the foundation of all the subsequent proceedings, and they must all necessarily accord with it, and if they do not accord with it, it follows that the notice itself is wrong. Thirdly, it is clear that there are no grounds whatever for imposing terms on the Plaintiff. There is no act done by him which has misled the company, therefore no reason why terms should be imposed upon him.

That brings me to what is the real question in the case, and that

is, whether the compulsory powers of this company extend to taking the Plaintiff's land for this purpose. Under the Act of 1864 it is conceded that this particular thing could not be done. The preamble of the Act of 1864 has been read; it recites that it is expedient to take certain lands and houses in connection—that is the widest way of putting it—with the Defendants' undertaking. Then those lands are specified, and the 6th clause says: "Subject to the provisions in this Act and in the incorporated Acts contained, the company may enter upon, take, and use all or any of the lands and other property shewn on the plans and described in the book of reference so deposited as aforesaid."

Now, considering what the law with reference to these companies is, I can have no doubt that this company could only take those specified lands for lawful purposes—that is, the specified lands for such purposes as were authorized by this Act, and that the Act must be taken quite as strongly as if it had expressly said that the company should take the land for those purposes, and for no other.

That being so, we then come to the Act of 1865. The Act of 1865 does specify other lands, and does give with reference to those other lands compulsory powers, and it in no way refers to the compulsory powers given by the Act of 1864; nor, even if the vestry had consented, do I think that any power was given by the Act of 1864 to make this substituted road. It might well be, if the vestry had given power to stop up *Albert Street*, that even with that consent there would have been no power to make the substituted road.

Then we come to the 58th section of this second Act, and beyond question all these compulsory powers are directly in derogation of private rights, and must be read most strongly against the railway company, and in favour of private rights. You cannot imply any extension of the compulsory powers unless there is a positive necessity for doing so. In this case there is no such necessity. It might well be that this company could agree with some one who would sell them land, which might lawfully be done under the *Railways Clauses Act*, or under the implied power which would arise under this 58th section. If they had agreed, or could now agree with this Plaintiff, they could do that thing which was a condition precedent to their having a right to stop up *Albert Street*. Or, again, if it were convenient to them to apply that land which

L. JJ. 1869 LAMB v. NORTH LONDON RAILWAY CO.

is in their own possession for the purpose of making this road, then they could do that thing which was a condition precedent to their stopping up *Albert Street*. It is clear, therefore, that it is not absolutely necessary to imply an extension of the compulsory powers, and as they are directly and distinctly in derogation of private rights, I am of opinion that it would not be a sound construction of Acts of Parliament of this sort to give to any such clause as the 58th section of this Act any such extensive meaning as that which would by implication extend the compulsory powers when in terms they are not so extended. If companies wish to extend their compulsory powers, they should tell the public so plainly, and they should give the public the opportunity of appearing before Parliament and opposing them if they think fit.

Upon these grounds the appeal motion must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Paine & Layton.*
Solicitors for the Respondents: Messrs. *Langham & Son.*

L. JJ. 1869 Feb. 27.

In re ABERAMAN IRONWORKS.

PEEK'S CASE.

Contributory—Conditional Allotment—Time allowed for Payment—Introduction of new Term.

P. applied for shares according to a form of application which bound him to pay, in addition to the £1 per share which he had paid on application, £4 per share "on allotment." On the 6th of September he received a letter stating that the directors had allotted him eighty shares, "on which £5 per share must be paid on or before the 15th instant." On the 10th of September, before anything further had been done, *P.* wrote to the company refusing to accept the shares:—

Held (affirming the decision of *Malins*, V.C.), that the application and the letter constituted a complete contract, and that the repudiation of the 10th of September was ineffectual.

Pentelow's Case (1) distinguished.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Malins* settling the name of Mr. *Peek* on the list of contributories of the *Aberaman Ironworks, Limited.*

(1) Law Rep. 4 Ch. 178.

The prospectus of the company required a deposit of £1 per share on an application for shares, and a payment of £4 per share more on allotment. Annexed was a form of application for shares. *Peek* made an application for shares according to this form; his application being as follows:—

"Having paid to your bankers the sum of £100, being the deposit of £1 per share on 100 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares, or any less number you may allot to me, and I agree to pay the deposit on allotment, and to sign the articles of association of the company when required; and I authorize you to insert my name on the register of members for the number of shares allotted to me."

On the 6th of September, 1864, *Peek* received from the secretary a letter, which was as follows:—

"In reply to and on the terms of your application, the directors have allotted to you eighty shares in the company, on which shares £5 per share must be paid on or before the 15th instant."

On the 10th of September, *Peek* wrote a letter to the company repudiating the shares on the ground of alleged misrepresentations in the prospectus, which he considered to differ essentially from one subsequently issued.

The company placed the name of *Peek* on the register. At what time this was done did not precisely appear, but it was not established that it was done before the receipt of *Peek's* letter of repudiation. He never paid anything more in respect of the shares, but on the 27th of September a call was made upon him of £5 per share, which he did not pay. Some correspondence passed between *Peek* and the officers of the company, in which they insisted on his being a shareholder, and threatened him with legal proceedings, but nothing had been done when, in June, 1865, an order was made to wind up the company.

Vice-Chancellor *Malins* held that the allotment was not conditional, but absolute, and that the secretary's letter, received on the 6th of September, 1864, could not be treated as introducing a new term, so as to prevent the application and the letter from constituting a complete contract, inasmuch as the allowing time for pay-

L. JJ. 1869 PEEK'S CASE.

ment till the 15th of September was wholly for the benefit of the allottee. His Honour considered that the alleged misrepresentations were not proved, and that Mr. *Peek* had not on the 10th of September any right to repudiate the shares. His Honour thought that Mr. *Peek's* name appeared not to have been on the register on the 10th of September, 1864, but held that this was immaterial, for that as Mr. *Peek* had bound himself to take the shares the directors had a continuing authority to put his name on the register, and if they put it on after the 10th of September the act was as effectual as if they had done it before that day.

Mr. *Glasse*, Q.C., and Mr. *Fischer*, for *Peek*, relied on *Pentelow's Case* (1).

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Ferrers*, for the official liquidator, were not called upon.

SIR C. J. SELWYN, L.J.:—

We have been much pressed in argument with our decision in *Pentelow's Case*. In that case we affirmed the decision of Vice-Chancellor *Malins*, who appeared to have founded his judgment, not without doubt and hesitation, upon all the particular circumstances of the case. It was a case very near the dividing line, and its circumstances were very materially different from those of the case now before the Court. In the first place, in *Pentelow's Case* there was a clear and admitted fraud, giving Mr. *Pentelow* an indisputable right to repudiate the contract, and that, in my judgment, is very far indeed from being the case in the matter now before us. In the next place, in *Pentelow's Case* the allotment was expressed in a conditional form, by means of a letter which introduced a new date, and before the expiration of the time fixed by that letter of allotment the conduct of both parties was such as to lead to the conclusion that neither of them considered that any final or binding contract had been entered into. I refer particularly to the letter of the 10th of August, in which, so far from stating to Mr. *Pentelow* that the contract had been actually entered into and completed, so far from telling him that the shares had

(1) Law Rep. 4 Ch. 178.

been actually allotted and actually registered in his name, the secretary says, "Mr. *Hyatt*, the traveller for the firm, will call on you in a day or two, and will furnish you with any further information you may require." In the present case, so far from there being any conditional form of allotment, or any such conduct on the part of the company as could be considered to express a doubt whether any final contract had been entered into, the company absolutely allot the shares, and say that the money must be paid, though it is true that they say that it must be paid on or before a particular day. They send notice of a subsequent call, and they have always consistently treated the present Appellant as a person bound by a concluded contract, and, consequently, as a shareholder. I think that those circumstances essentially distinguish this case from *Pentelow's Case* (1).

[His Lordship then stated his reasons for holding that the alleged misrepresentations in the prospectus were not established.]

It is true that the present Appellant cannot be said to have lain by and taken advantage of an opportunity of seeing whether this company became prosperous or not. It is true that he did attempt to repudiate the contract within a very short time after it was entered into, but, in my judgment, he has entirely failed in shewing any such circumstances as would entitle him to repudiate it, he having applied for shares in the common form, having authorized the insertion of his name in the register, and then having received a letter of allotment which said that the shares were allotted to him, and merely required the payment of money consequent upon such allotment. I think therefore, that the present appeal entirely fails, and must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

I am of the same opinion. As regards *Pentelow's Case* we certainly went to the extreme verge of the cases of that character, and we based our decision upon this, that the contract was conditional, and that, in point of fact, Mr. *Pentelow* had a right to assume throughout that his name was not on the share register. Now here, certainly, there is no conditional contract. There is a

(1) Law Rep. 4 Ch. 178.

L. JJ. 1869 PEEK'S CASE.

most distinct allotment, and a notice to pay on a particular day. And when that letter of allotment was received Mr. *Peek* certainly had no right to assume that his name would not when that allotment was sent be then and there placed upon the list of shareholders. The next question, then, is, whether any such fraud is shewn as would entitle Mr. *Peek* to repudiate. I am of opinion on the facts which are here proved that no such fraud is made out. That being so, the whole case is disposed of, and it is enough to say that from the very first Mr. *Peek* knew that it was a matter of dispute between himself and the company whether he had or had not a right to repudiate, that he knew throughout that they were disputing his right to repudiate, that he knew throughout that they were holding him to his contract, and that he supposed throughout that they would put his name upon the list, and assert a right to do so. In that state of things, I am clearly of opinion that the writing of the letter of repudiation is not a ground to excuse him from being on the list. I entirely agree with the Vice-Chancellor that the evidence would not satisfy me that *Peek's* name was on the register before the 10th of September, 1864, but I also agree with him in considering that circumstance utterly immaterial. The ground on which we distinguished *Pentelow's Case* (1) from *Oakes* v. *Turquand* (2) does not exist here.

Solicitors: Messrs. *Maynard & Co.*; Messrs. *Chester & Urquhart.*

(1) Law Rep. 4 Ch. 178. (2) Law Rep. 2 H. L. 325.

TENNANT *v.* TRENCHARD.

L. C.
1869
Jan. 26, 28;
Feb. 24;
May 25.

Trustee—Mortgagee—Sale or Foreclosure—Leave to bid—Practice—Varying Minutes.

By a deed of trust, property was conveyed to the sons of the settlor upon certain trusts for the benefit of the children and grandchildren of the settlor. The trustees had power to sell, and extensive powers of management, and provisions were made that any trustee advancing money to the settlor, or paying off any part of a certain mortgage debt, should be entitled to a charge by way of mortgage on the estate. One of the trustees advanced considerable sums to the settlor, and paid off part of the mortgage debt:—

Held, on the construction of the deed, that the trustee was not entitled to have such a mortgage on the estate as would empower him to foreclose, and was entitled only to a sale:

Semble, that a trustee who is also mortgagee will not be allowed to foreclose.

Decree of *Giffard*, V.C., varied.

If any of the *cestuis que trust* object, a trustee of an estate, though also a mortgagee, will not be allowed to bid at a sale of the estate directed by the Court; but, *semble*, if the estate is not sold at the sale, the trustee may be allowed to become the purchaser under proposals to the Court.

Order of *James*, V.C., affirmed.

A party who is dissatisfied with the minutes of decree as prepared by the Registrar may move to have them varied, but the Lord Chancellor will not allow a cause to be set down to be spoken to on the minutes.

BY a deed of trust or settlement, dated the 9th of April, 1835, *Margaret E. Tennant*, widow, conveyed a certain messuage called *Cadoxton Lodge*, and two canals, and mineral and other property of considerable extent in the county of *Glamorgan*, to her sons *Henry Tennant*, *Charles Tennant*, and *George Tennant* (subject to a mortgage for £50,000 to *J. Wormald* and *W. Fuller*, who were trustees for the banking house of Messrs. *Child & Co.*), upon certain trusts for the said *Henry Tennant*, *Charles Tennant*, and *George Tennant*, and the three daughters of *Margaret E. Tennant*, for their respective lives, and after their deaths for the benefit of their children. The deed gave very large powers of management to the trustees, and particularly to the senior acting trustee, and gave them powers of sale, and directed the accumulation of a sinking fund to pay off the mortgage to Messrs. *Child*. And the deed contained a provision that if any of the children should hold any

L. C. 1869 TENNANT v. TRENCHARD.

bond, note, or other security, or any acknowledgment in writing for money advanced, or to be advanced, to or for the use of the said *Margaret E. Tennant* during her life (which should not have been paid or satisfied at the time of her death), then and in such case the party or parties holding such security or securities, or acknowledgment in writing, and entitled to the money secured or acknowledged thereby to be due and owing to him, her, or them, should be entitled to a charge by way of mortgage on all the lands, hereditaments, and premises thereby released and assigned, or intended so to be, for the amount of the principal money so to be secured, with all interest which should be due thereon at the time of the death of the said *Margaret E. Tennant*, such charge to take effect next after the said mortgage to the said *John Wormald* and *William Fuller*, in addition to any beneficial interest which might accrue to such party or parties under or by virtue of the said indenture. The deed also contained a proviso that if any of *Margaret E. Tennant's* children should pay off and discharge the debt due on the mortgage to *Wormald* and *Fuller*, or any part thereof, then the party or parties so paying the same should be entitled to stand and be a mortgagee or mortgagees on the estate for the moneys so paid and interest in the place and stead of *Wormald* and *Fuller*.

In 1839 *Charles Tennant* paid to *Wormald* and *Fuller* £7500 in discharge of principal on their mortgage, and in 1851 he bought for the benefit of the trust estate some property called the *Compton Estate* for £12,339. He also made large advances to *Margaret E. Tennant*. In 1850 *Margaret E. Tennant* died, leaving certain property upon the same trusts as those of the trust deed, but charged with a mortgage for £8000 due to one *Davidson*.

In 1859 *Charles Tennant* filed a bill against *Henry Tennant*, the then senior acting trustee, and the other parties interested under the trust deed, for the administration of the estate, and a receiver was appointed and accounts were directed and taken, from which it appeared that there was due from the estate to *Charles Tennant*, in respect of the money paid by him in discharge of *Child's* mortgage and interest thereon, £14,865; in respect of the purchase of the *Compton* estate, £23,503; also further sums advanced to *Margaret E. Tennant*, amounting to £43,803.

In 1867 *Charles Tennant* paid to *Davidson* the sum of £8700 for principal and interest, and took a transfer of his mortgage.

In February, 1867, *Charles Tennant*, who had now become senior acting trustee under the trust deed, and also tenant for life of two-sevenths of the estate, filed the bill in this suit against all the parties interested in the trust deed, praying an account of what was due to him in respect of the said sums of £8700, £14,865, £23,503, and £43,803, and interest, and that in default of payment the Defendants might be foreclosed.

The suit came on for hearing before the Vice-Chancellor *Giffard*, who made a decree that an inquiry should be made as to what was due to the Plaintiff on the security; that upon the Defendants paying the sum of £800 into Court the estates should be sold in one lot free from all incumbrances except that of Messrs. *Child*, with a reserved bidding more than enough to cover the debt, &c.; but if the £800 was not deposited, or the estate not sold, then the decree was to be without prejudice to the right of the Plaintiff to foreclose. An inquiry was also directed as to the *Compton* estate (1).

(1) 1868. June 1.

SIR G. M. GIFFARD, V.C.:—(14 W.R. 170)

The first question is, whether the Plaintiff can sustain his suit at all, as to which I have never had the slightest doubt. Though you may call in question the right of a trustee to purchase a mortgage at an undervalue, it is perfectly absurd to suppose that because a person is a trustee he is to lose his rights as a mortgagee; nor can I have the least doubt about the right of a tenant for life as a mortgagee. So far as the Plaintiff is tenant for life of the two-sevenths, he cannot enforce his securities against the inheritance, but *ultrà* that he may enforce them against the inheritance. That being so, we come to the substantial questions in the suit, which are: What are Mr. *Charles Tennant's* strict rights, and what discretion have I under the statute 15 & 16 Vict. c. 86, s. 48, because apart from that statute it is quite clear that I have no discretion at all. As regards the discretion under the statute, I should very much like to have this estate sold if I could, but I can only do it if I can be satisfied that there is reasonable ground for thinking that if there is a sale there will be a surplus, and if I can be satisfied that Mr. *Charles Tennant* will be indemnified against any loss which may accrue to him by reason of an abortive sale. If there is a decree for sale, it must be under the 48th section, and I shall impose these terms—that there be two satisfactory affidavits that the money likely to arise from a sale will exceed the incumbrances; and that there be money paid into Court to cover any loss that may happen by reason of an abortive sale; with an undertaking to abide by any loss that may happen in the event of an abortive sale.

With respect to the rest of the case, I do not hesitate to say that, in my opinion, there is a right to foreclose. I

L. C. 1869

TENNANT v. TRENCHARD.

Some of the children of *Henry Tennant* who took interests under the trust deed appealed against this decree.

---

think there is a right to foreclose in respect of the charges given by the settlement, because the right given by the settlement is very different from that which was given in some of the cases cited, where the contract has been that if there was default, then the trust for sale should be exercised, but in this settlement the trust for sale is a mere power of sale if, in the discretion of the trustees, it is thought fit to sell. That is not a case which deprives the trustee of the ordinary rights of a mortgagee, and the ordinary rights of a mortgagee, whether legal or equitable, are to have a foreclosure. As regards *Davidson's* mortgage, nobody has said that a foreclosure is not right there, and *Vint* v. *Padget* (2 De G. & J. 611) would, I think, apply to *Davidson's* mortgage, and the other charges, always excepting that in respect of the *Compton* estate.

Then it was said, and in ordinary cases it would be so, that you cannot pay off a portion of a charge such as *Child's* mortgage, and have foreclosure in respect of the portion so paid off. But it does so happen that there is a positive contract to the effect that the person who does pay off a portion of that charge shall stand as a mortgagee in respect of that portion; and if there is a contract of that description, that would vary the usual rule, and it would be the same thing as if it were a separate and distinct advance by the person who so paid off the charges.

I do not think I need go further into the case. I have said that the suit can be maintained. I have said that, under certain conditions, if they can be complied with, I think a sale would be the proper course. If the sale should turn out to be abortive, then there must be inquiries as to the *Compton* estate and other matters, and I cannot go on now to direct foreclosure until the certificate comes back after these inquiries, but I do not hesitate to say that I think there would clearly be a right to foreclosure as to everything except the *Compton* estate, and the only question as regards the *Compton* estate would be, whether *Vint* v. *Padget* applies or not, even assuming that nothing more were done than that the trustee purchased the *Compton* estate out of his own moneys. I think something very equivalent to foreclosure would be the right of the trustee, because I cannot conceive that the Defendants can have a right, knowing that the property is not enough to pay, to say to a trustee that he shall sell whether he likes it or not; and the lowest right of the trustee would be that of a vendor having a lien for unpaid purchase-money. Whether that right is called foreclosure, or anything else, it is quite clear that a vendor who has a lien for unpaid purchase-money, and cannot get paid, may cancel the sale, which would be equivalent to foreclosure; therefore, whether it is called foreclosure or not, Mr. *Tennant's* right would be, not to have a sale forced upon him, but to have the estate, unless the parties choose to agree, and then, of course, the two-sevenths, of which he is tenant for life must be provided for.

Evidence was subsequently produced as to the value of the property, and the Vice-Chancellor, on the 29th of June, made a decree as mentioned above.

Sir *Roundell Palmer*, Q.C., Mr. *Freeling*, and Mr. *Speed*, for the Appellants :—

We object to this decree, and contend that it ought to be for a sale absolutely and not upon conditions, and that no foreclosure ought to be decreed in this case. It is true that the Plaintiff has a charge upon this estate, but he is also a trustee, and he is tenant for life of two sevenths, either of which is sufficient to prevent him from foreclosing. *Lucas* v. *Seale* (1), *Sampson* v. *Pattison* (2), *Footner* v. *Sturgis* (3), *Parker* v. *Housefield* (4), *Tuckley* v. *Thompson* (5), *Creswick* v. *Harrison* (6), are authorities that where there is only a charge, sale and not foreclosure is the proper relief. But a mortgagee who is also trustee will not be allowed to foreclose: *Scweitzer* v. *Mayhew* (7); *Hill* v. *Browne* (8); *Hamilton* v. *Wright* (9); *Attorney-General* v. *Munro* (10); *Vint* v. *Padget* (11). As to two sevenths, he is tenant for life; the foreclosure, therefore, can only apply to five sevenths, and how can the decree be worked out? At all events, as to the estate bought by him there can be no foreclosure.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiff :—

A foreclosure may be decreed where there is a charge, though the authorities are conflicting: *Price* v. *Carver* (12); *Cox* v. *Toole* (13); *Lechmere* v. *Clamp* (14).

There is no reason why a man should not be both mortgagor and mortgagee in different capacities, and obtain his full rights in each capacity: *Sambroke* v. *Hanbury* (15). In this case the deed expressly provides that the trustees are to have a charge for any money advanced by them. Why should a mortgagee lose any of his rights because he happens to be a trustee? *Morret* v. *Paske* (16). He has advanced this money, which it is admitted has been for the benefit of the estate, and he can get neither principal nor

(1) 2 Atk. 56.
(2) 1 Hare, 533.
(3) 5 De G. & Sm. 736.
(4) 2 My. & K. 419.
(5) 1 J. & H. 126.
(6) Set. Dec. 444.
(7) 31 Beav. 37.
(8) Dru. 426.
(9) 9 Cl. & F. 111.
(10) 2 De G. & Sm. 122, 163.
(11) 2 De G. & J. 611.
(12) 3 My. & Cr. 157.
(13) 20 Beav. 145.
(14) 30 Ibid. 218.
(15) Set. Dec. 427.
(16) 2 Atk. 52.

L. C. 1869

TENNANT v. TRENCHARD.

interest. The general principles asserted as to a mortgagee and trustee may be correct, but here the deed has expressly provided for the very case. Ought he to have resigned as soon as he had advanced the money?

LORD HATHERLEY, L.C.:—

The deed of settlement in this case is quite *sui generis*, and I have to consider, in the first place, what is the reasonable construction to be put upon it. I much regret that I have come to a conclusion different from that of Vice-Chancellor *Giffard;* and I should have felt very much more hesitation if it depended solely and entirely upon the construction of the deed; but I do not think it is so, for there is another important point in the case, to which I shall afterwards refer. My impression of the true construction of this deed is, notwithstanding the expressions there used with reference to charges by way of mortgage, and to those entitled to stand as mortgagees, that it was intended simply to give those who should contribute the sums of money referred to in connection with those particular directions a charge upon the property and nothing more, there being no direction whatever in the deed to carry into effect that which would be in substance a mortgage, or that, upon payment of the money, the trustees should be called upon to execute a mortgage to the persons advancing the money. In my opinion the real and substantial intent of the parties was, looking at the whole character of the deed, that there should be a right to claim by way of charge every sum advanced for Mrs. *Tennant's* use and acknowledged under her hand, or advanced for the purpose of paying off part of *Child's* mortgage, or the whole of the debt.

It has been argued with considerable force, having regard to the authorities, that if a person has a charge, the right to foreclose accrues. But although some of the authorities appear to conflict with each other, it seems, on the whole, to be settled that if there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not foreclosure. There is no magic in the mere words; and although they would be strong in the ordinary case of an

instrument creating *simpliciter* a right to charge by way of mortgage, yet the whole character of the transaction must even then be looked at. All that Mrs. *Tennant* contemplated was, that the trust should go on as long as possible, but she never contemplated that any one of those persons who advanced money to her in her lifetime was to have a formal mortgage executed by which he could be put in a position to foreclose the estate, and that, instead of realizing by a sale what might be realized, he should be able to destroy the trusts of the settlement.

As to the clause respecting the mortgage to Messrs. *Child*, the intent was, that if they paid the whole mortgage off, of course they would be at liberty to take an assignment from the Messrs. *Child*, and, subject to the other question of the trustees' position, they would be in the same position as any other person taking an assignment of a mortgage, and having all the rights which the original mortgagee could convey to them. But if part only was paid off, nothing more was meant than in the former part of the deed, for Mrs. *Tennant* did not intend to execute an instrument by which some of those persons who might advance sums of money, being objects of the trust, should be able to defeat all the other objects of the trust by foreclosure. She must be taken to have known that it was in the highest degree improbable that her children or her grandchildren, who were the principal objects of the trust, would be able themselves to raise the fund for redeeming the mortgage.

The trustees had unusually extensive powers, and there was the utmost anxiety manifested throughout to preserve the estate from being destroyed, but with all those powers there was no power to execute a mortgage to any of the persons declared to have a charge by way of mortgage. I think the sound construction of that instrument would be, that these charges by way of mortgage were to be simply charges payable by selling parts of the estate, and that it would not be a proper execution of the trusts of this instrument to hold that there ought to be a formal instrument of mortgage executed, giving a right to foreclose to those persons who so advanced the money.

But the second point in the case appears to me to be conclusive upon the present contention. First of all, supposing that Mr. *Charles*

L. C. 1869

TENNANT v. TRENCHARD.

Tennant had acquired a right under certain circumstances to call for a mortgage of this property, and that having, under those circumstances, the ordinary right of foreclosure while he was the senior managing trustee, with all the powers vested in him, he applied to this Court for foreclosure. Then he would be placed in a position which the Court invariably controls, of a person whose duty and interest are entirely conflicting. He seems to have behaved with great consideration towards all those concerned in the estate, and to have saved the estate at times from very considerable peril; but it is the duty of every trustee to make the most he can of the trust property for the benefit of the *cestuis que trust*, and the only possibility of saving the estate must be by selling some portion of it. As mortgagee he is not at all interested in doing that, but is interested in foreclosing the estate, and when he has foreclosed he will become the master of the estate, and the whole of the trust which he is bound to protect will be entirely frustrated. So, again, if he were only *cestui que trust* and not mortgagee, or only trustee and not mortgagee, on a bill being filed for foreclosure, he would immediately try to sell all the property to the greatest advantage in order to realize sufficient to pay off the mortgage and save the estate from destruction. But from the first moment that he becomes mortgagee it is greatly to his interest that the estate should be at once foreclosed.

This case must be put upon the broad principle, that the trustee is in a position in which it is impossible for him, if a foreclosure is granted, to make the performance of his duty coincide with his interest, and therefore this Court would be bound, even if this deed gave him the power of foreclosure, to say that it was impossible to allow him to foreclose when his duty was to take every possible step for the saving of the estate. In that respect the observations made by Lord *Brougham* in *Hamilton* v. *Wright* (1) are of very considerable force, though the doctrine is so well recognised in this Court that the authority of the House of Lords was scarcely required to affirm it.

But my decision may also be rested upon the narrower ground of the construction of the deed, as meaning that the charge was to be a simple charge, not by way of mortgage in the technical

(1) 9 Cl. & F. 123.

sense of giving a right to foreclose, but coming in in its proper place among the different charges existing on the estate.

The Vice-Chancellor's decree must therefore be varied by striking out the direction as to the deposit, and directing a sale to be made at Chambers under the direction of the Judge, reserving further consideration. The costs of the appeal will be costs in the cause, and the deposit will be returned.

Feb. 24. Mr. *Speed* applied *ex parte* to have this cause set down upon the minutes, his clients being dissatisfied with the minutes as given out by the Registrar.

The LORD CHANCELLOR said that he objected to having causes set down upon minutes. Any party who objected to the minutes must give regular notice of motion to vary the minutes. His Lordship would give leave to give the notice of motion.

Mr. *Speed* then asked that the drawing up of the order might be stayed in the meantime.

The LORD CHANCELLOR said that he was informed by the Registrar that if leave was given to move to vary the minutes, the drawing up of the order would be stayed as a matter of course.

The motion was set down for hearing on a subsequent day, but was either abandoned or arranged by agreement.

May 25. Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, now applied, by way of appeal from an order made by the Vice-Chancellor *James*, that the Plaintiff *Charles Tennant* might have leave to bid at the sale:

The sale was under the Court and not by the trustee. The trustee, therefore, could not influence the sale, and any addition to the number of bidders must be advantageous: *Ex parte Lacey* (1); *Ex parte James* (2), were authorities: *Lewin* on Trusts (3). The

(1) 6 Ves. 625. (2) 8 Ves. 337. (3) 3rd Ed. p. 460.

L. C. 1869 TENNANT v. TRENCHARD.

Plaintiff was a merely nominal trustee, there being a receiver, and the estate being administered by the Court. Upwards of £40,000 was due to him, on which he could get neither principal nor interest; and he could not get the estate, as the Court had refused a foreclosure. Nearly all the *cestuis que trust* were willing that the Plaintiff should bid.

Mr. *Freeling*, and Mr. *Speed*, for the children of *Henry Tennant*:—

The Plaintiff is a trustee, and has naturally acquired knowledge about this estate, which he is bound to communicate for the benefit of the sale; the Court, therefore, will not allow him to be put in a position where his interest conflicts with his duty. *In re Bloye's Trust* (1), *Hamilton* v. *Wright* (2), *Price* v. *Byrn*, cited in *Campbell* v. *Walker* (3), and *Parkinson* v. *Hanbury* (4), are authorities against the trustee being allowed to buy. If it is known that he intends to bid, other persons will be deterred from attending the sale. Of course where all the *cestuis que trust* are adults and consent, the trustee can buy, or he can, where there are infants, file a bill and obtain leave to buy; but in no case where there are adults who object, has leave ever been given.

Mr. *Karslake*, Q.C., in reply.

LORD HATHERLEY, L.C.:—

The peculiarity in this case is that the trustee is also an incumbrancer. His powers were very extensive as trustee, and he has also become a mortgagee by paying off incumbrances. I have already decided that he cannot foreclose, as it is his duty to do all that he can to save the estate; and the fact of his having been replaced by a receiver does not alter his position in that respect. The justice of the case requires that he should not be allowed to buy until an attempt has been made to sell the estate. The authorities shew that this Court will set aside every sale out of Court to a trustee, and will further fix him with the price he proposed to give, in the event of the pro-

(1) 1 Mac. & G. 488; 3 H. L. C. 607.
(2) 9 Cl. & F. 111.
(3) 5 Ves. 681.
(4) Law Rep. 2 H. L. 1.

perty not fetching more upon a re-sale. The cases where liberty to bid has been refused, are mostly cases of solicitors, the reason of the rule being, that a solicitor must have acquired much information, and that the Court could feel no security that he would do his duty and communicate this information so as to raise the price, if he had a prospect of becoming the purchaser. But the reason of the rule applies to trustees as strongly as to solicitors, and though the Plaintiff has really suffered great hardship in this case, he must be considered to have considerable knowledge of the estate, which is of a very peculiar character, part of it consisting of a canal and of the business of the canal. It has been said that his bidding will be an advantage to the sale, as the more bidders there are the better chance there will be of a good sale; but, on the other hand, the knowledge that the trustee was a bidder might keep others away, as they might consider that he would bid to the utmost value of the property, and then, if any one else bid more, would leave it.

The rule is, that if those who are interested in the estate insist that a trustee ought not to be allowed to bid, the Court will certainly give so much weight to their wishes as to say that until all other ways of selling have failed he shall not be allowed to buy. But if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the Plaintiff may be allowed to make proposals and to become the purchaser. The motion must be refused with costs.

Solicitors for the Plaintiff: Messrs. *Harrison, Finch, & Harrison.*
Solicitors for the Appellants: Messrs. *Roberts & Simpson.*

L. JJ.
1869
May 3.

HEARD *v.* PILLEY.

Specific Performance—Vendor and Purchaser—Statute of Frauds, s. 8—Contract by Agent appointed by Parol—Demurrer—Pleading—Sufficiency of Allegation of Contract.

A contract for the purchase of land made by an agent will be enforced, although the agent be appointed merely by parol.

In a bill filed by a purchaser for specific performance of a contract for sale, it was alleged that the contract was made by one of the Defendants as agent for the Plaintiff, but that the agent claimed the benefit of the contract for himself. It appeared by the statements in the bill, that the agent was appointed merely by parol.

Demurrers by the two Defendants, the agent and the vendor, were overruled.

The decision of *Malins*, V.C., affirmed.

Bartlett v. *Pickersgill* (1) commented on.

An allegation in a bill by a purchaser for specific performance that he was informed by his agent that a written agreement was executed, followed by statements referring to the agreement as actually made:—

Held, on demurrer, a sufficient allegation of the execution of a written contract.

THIS was an appeal from a decision of Vice-Chancellor *Malins*, overruling the demurrers of the two Defendants in the above suit.

The bill was filed by *James Rowe Heard* against *William Pilley* and *Samuel Sugden*, and stated as follows:—

The Defendant *Pilley* suggested to the Plaintiff that he might advantageously obtain a lease of a house in *Fore Street*, in the City of *London*, belonging to the Defendant *Sugden*, adding that he himself had no capital with which to speculate. The Plaintiff accordingly employed *Pilley* to obtain for him a lease of the house, and to purchase the interest of the outgoing tenant. *Pilley* subsequently agreed with *Sugden*, in his own name, for a lease of the house, and informed the Plaintiff that he had done so, and told him that the agreement was contained in a letter from *Sugden*, dated the 19th of October, 1868; and he also paid the outgoing tenant £100 for his interest.

The bill then stated that *Pilley* entered into the agreement with *Sugden* and the tenant respectively as the agent for and on behalf

(1) 4 East, 577, n.

of the Plaintiff; and that the Plaintiff offered him one-third of the profit to be made on a re-sale of the premises, or £10 in case the Plaintiff should elect not to sell them. The authority and instructions given to *Pilley*, as stated in the bill, were entirely verbal.

Pilley subsequently refused to give the Plaintiff the benefit of the lease, and the Plaintiff accordingly filed the present bill, praying that it might be declared that *Pilley* had entered into the agreement with *Sugden* as his agent, and that *Sugden* might be decreed to grant a lease of the premises in accordance with the agreement.

Both the Defendants demurred for want of equity, but the Vice-Chancellor overruled the demurrers. The Defendants accordingly appealed.

Mr. *Glasse*, Q.C., and Mr. *Jolliffe*, for the Defendant *Pilley*:—

There is no distinct allegation in the bill of any written contract between *Sugden* and *Pilley*: it is merely stated as being alleged by *Pilley*. This is not sufficient to support the bill: *White* v. *Smale* (1); *Clark* v. *Lord Rivers* (2); *Jackson* v. *Oglander* (3). But our principal ground of objection is, that the bill alleges no written appointment of *Pilley* as the Plaintiff's agent; the transaction between them was entirely by parol. This is, therefore, an attempt to constitute *Pilley* a trustee for the Plaintiff by a parol agreement, which is contrary to the 8th section of the *Statute of Frauds*. This very point was expressly decided in *Bartlett* v. *Pickersgill* (4), where it is laid down that a parol agency does not create a trust which can be enforced against the agent. This case has never been overruled, and is referred to as a binding authority by Lord *St. Leonards* and Mr. *Dart* in their treatises on Vendors and Purchasers (5).

The cases relied on by the other side are distinguishable. In *Dale* v. *Hamilton* (6) there was a partnership. In *Taylor* v. *Salmon* (7) there was a letter referring to the agency. In other

(1) 22 Beav. 72.
(2) Law Rep. 5 Eq. 91.
(3) 2 H. & M. 465.
(4) 4 East, 577, n.
(5) Sug. V. & P. 14th Ed. p. 703; Dart's V. & P. 3rd Ed. p. 599.
(6) 2 Ph. 266.
(7) 4 My. & Cr. 134.

13 L.J. Ch. 578.

L. JJ. 1869 HEARD v PILLEY.

cases the *Statute of Frauds* was not pleaded by the Defendant, or else the question arose as an independent point, whether the relation of solicitor and client existed between the parties.

[The LORD JUSTICE SELWYN referred to *Willis* v. *Willis* (1).]

Mr. *Lawrence*, for the Defendant *Sugden*.

Mr. *Cotton*, Q.C., and Mr. *Berkeley*, for the Plaintiff:—

The Plaintiff is not seeking relief against *Pilley*, but he asks for specific performance against *Sugden*, alleging that the contract with *Sugden* was in reality the Plaintiff's contract; and he establishes that by averring that *Pilley* was his agent in the transaction. The contract between *Pilley* and *Sugden* is sufficiently alleged in the bill as having been made in writing, and there is therefore nothing inconsistent with the *Statute of Frauds* in the Plaintiff's claim. The case of *Bartlett* v. *Pickersgill* (2) is clearly distinguishable from the present case, for it was not a suit for specific performance of an unexecuted contract, but to oblige the agent, who had obtained a conveyance of the estate, to convey it to the Plaintiff. Moreover, it is very doubtful whether that case would be considered good law at the present time, for it appears inconsistent with the 8th section of the *Statute of Frauds*, which excepts the case of trusts arising by implication. The cases of *Lees* v. *Nuttall* (3), *Davies* v. *Ottey* (4), *Dale* v. *Hamilton* (5), and *Taylor* v. *Salmon* (6), are in our favour. There is a distinction between the 1st and 8th sections of the *Statute of Frauds:* in the 1st section, which relates to conveyances of interests, it is required that the agency should be evidenced by writing; but this is not required by the 8th section, which treats of agreements. This distinction is remarked by Lord *St. Leonards* in his treatise on Vendors and Purchasers (7). The conduct of *Pilley* was a breach of confidence, and a fraud upon the Plaintiff, against which the Court has power to relieve.

(1) 2 Atk. 71.
(2) 4 East, 577, n.
(3) 1 Russ. & My. 53.
(4) 33 Beav. 540.
(5) 2 Ph. 266.
(6) 4 My. & Cr. 134.
(7) 14th Ed. p. 145.

Mr. *Jolliffe*, in reply:—

There was no fraud in the conduct of *Pilley*. He acquired no special information, and gained no advantage of any kind from the relation in which he stood to the Plaintiff.

SIR C. J. SELWYN, L.J.:—

In this case two questions have been raised; first, whether there is any sufficient allegation in the bill, that an agreement was, in fact, entered into by the Defendant *Pilley* in writing so as to constitute it an agreement which could be enforced, having regard to the provisions of the *Statute of Frauds*; and, secondly, as between the Plaintiff and the Defendant *Pilley*, whether there is such allegation of agency as is consistent with the provisions of that statute, and which can be enforced.

With regard to the first point, we did not think it necessary to hear the Respondent's counsel; for although the statement relating to the letter from *Sugden* does not amount to a positive allegation, still, coupling it with the subsequent statement to this effect, "That *Pilley* entered into the said agreement with the said *Samuel Sugden* and *Robert Brown*, the tenant, respectively as the agent for and on behalf of the said *James Rowe Heard*," and with other statements in the bill, I think there is sufficient allegation of an agreement, and an agreement constituted by the letter written and signed by the Defendant *Sugden*, so as to render it impossible for him to set up a case that there is no contract in writing relating to this property. Then with regard to the agency of *Pilley*, in the first place, the fact of the agency is distinctly stated in the paragraph which I have read. And although it may be true that he afterwards disputed or questioned that agency, the fact must be taken as clear and indisputable. This bill is therefore brought into the category of those very common bills—a bill alleging a contract entered into in writing with a person averred to be the agent of the Plaintiff, and praying specific performance against the agent and against the person with whom that agent has entered into the contract. That is a bill of a very ordinary description, and it is a startling proposition to say that unless the bill alleges that the agency was constituted by writing, such a bill cannot be sustained.

L. JJ.
1869
HEARD
v.
PILLEY.

The only authority which has been cited in support of that proposition is *Bartlett* v. *Pickersgill* (1); but that case does not govern the present one, for that was a case in which the conveyance was executed, and in which it appears, from the short statement of the case, which is in a note, that the bill was a bill by the Plaintiff seeking for a conveyance to the Plaintiff as against the Defendant, to whom a conveyance had already been made. The statement is this:—"The Defendant bought an estate for the Plaintiff, but there was no written agreement between them, nor was any part of the purchase-money paid by the Plaintiff. The Defendant articled for the estate in his own name, and refused to convey to the Plaintiff, so this bill was brought to compel a conveyance." That is, after the conveyance had been executed the bill was filed by the Plaintiff seeking for a conveyance of that estate from the Defendant, to whom the conveyance had been made. That entirely distinguishes that case from the present, which is an ordinary suit by a principal, bringing before the Court an agent and the person with whom the contract has been entered into. Assuming the case of *Bartlett* v. *Pickersgill* to be good law, it cannot, I think, be considered as laying down any such general proposition as is contended for by the Defendants. At all events it would be subject to qualifications, especially to those which are mentioned by Lord *St. Leonards* in the passage in his book on Vendors and Purchasers (2), which has been read to us by Mr. *Berkeley*, and it is also subject to the qualification established by Lord *Hardwicke* in the case referred to of *Willis* v. *Willis* (3), where His Lordship says: "There is another way of taking a case out of the statute, and that is, by admitting parol evidence, within the rules laid down in this Court, to shew the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser." It is not altogether unworthy of remark that it is expressly stated in this bill that "*Pilley* said he had not capital with which to speculate." I cannot at all accede to the argument urged in reply, that, under these circumstances, when the agent goes to the principal and says, "I will go and buy an estate for you," it is not a fraudulent act on his part afterwards to buy the estate for

(1) 4 East, 577, n. (2) 14th Ed. p. 145. (3) 2 Atk. 71.

himself, and to deny the agency. I think that would be an attempt to make the *Statute of Frauds* an instrument of fraud; therefore I agree with the judgment of the Vice-Chancellor, and I think that both of these demurrers were properly overruled, and that both Petitions of appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

In this case, although the paragraph relating to the letter from *Sugden* would not amount to a sufficient allegation of agreement between the Plaintiff and the Defendant, I am satisfied that when you take it in connexion with the other statements in the bill, there is a clear allegation of an agreement in writing signed by *Sugden*. That being so, the only other question is that which is raised by the case of *Bartlett* v. *Pickersgill* (1), and it is enough to say that here there has been no conveyance from *Sugden* to *Pilley*, and that the whole object of the bill is to enforce specific performance between the Plaintiff and *Sugden*. *Pilley* is brought here simply to be bound, and nothing else, and no conveyance is sought from him. I cannot help adding, as regards the case of *Bartlett* v. *Pickersgill*, that it seems to be inconsistent with all the authorities of this Court which proceed on the footing that it will not allow the *Statute of Frauds* to be made an instrument of fraud.

Solicitor for the Plaintiff: Mr. *G. E. East.*
Solicitors for the Defendants: Mr. *W. T. Bateson*; Mr. *A. Watson.*

(1) 4 East, 577, n.

L. JJ.
1869
May 8.

In re DARE VALLEY RAILWAY COMPANY.

Arbitration—Enlarging Time—Common Law Procedure Act, 1854, *ss.* 8, 15—*Lands Clauses Act*, 1845, *s.* 23.

An award by an umpire under a reference pursuant to the *Lands Clauses Act* for ascertaining the amount of compensation having, on the application of the landowner, been set aside by the Court, and the matter referred back to the umpire, no proceeding was taken under the reference for nearly seven months from the date of the order, and the landowner then served the company with notice of his desire to have the compensation settled by a jury. The company applied to have the time for making the award extended:—

Held, by *James*, V.C., that the provisions of the *Common Law Procedure Act*, 1854, with regard to remitting matters to the reconsideration of the arbitrator, and enlarging the time for making the award, applied to references under the *Lands Clauses Act*, and that the Court had jurisdiction to extend the time, but that after the delay which had taken place this jurisdiction ought not to be exercised so as to deprive the landowner of a trial by jury.

On appeal this decision was affirmed.

THIS was a motion by the *Dare Valley Railway Company* by way of appeal from a decision of Vice-Chancellor *James*, before whom the company had moved that the time within which the umpire, *John Clutton*, named in an order of this Court made on the 9th of July, 1868, was to make his award in pursuance of such order, in case such time had expired, might be extended until the expiration of two months from the date of the order to be made on the motion, and that *Rhys* and *Richards* might be restrained by injunction from prosecuting an action commenced by them for recovering £3500 claimed by them from the company, and from attempting to enforce their claim for compensation against the company, except under the reference to *Clutton* in pursuance of the order of the 9th of July, 1868.

The Respondents, *Rhys* and *Richards*, claimed for the value of their land required by the *Dare Valley Railway Company* by a notice to treat served on the 1st of August, 1864, and for compensation, the sum of £3500. Differences having arisen between the parties with respect to the amount to be paid, these differences were referred, in pursuance of the *Dare Valley Railway Act*, 1863,

and the *Lands Clauses Act*, 1845, to two arbitrators. An umpire, *Clutton*, was on the 12th of April, 1867, appointed by the Board of Trade (*Lands Clauses Act*, s. 28), and by his award, dated the 29th of January, 1868, he awarded £50 as the sum to be paid by the company to the Respondents for purchase and compensation money. The submission to arbitration having been made a rule of Court by the Respondents, they moved to set aside this award, and on the 9th of July an order was made by Vice-Chancellor *Giffard* that upon *Rhys* and *Richards*, by their counsel, undertaking not to make any claim beyond 5*s.* for damage done to the surface of the land and hereditaments purchased by the company, it should be remitted back to *Clutton* to reconsider and redetermine the matters referred to him. The order as drawn up was headed "In the Matter of the *Dare Valley Railway Act*, 1863, and in the Matter of the Arbitration between the *Dare Valley Railway Company* and *R. H. Rhys* and *E. Richards*, and In the Matter of the *Lands Clauses Consolidation Act*, 1845." A more full statement of the facts will be found in the report of the case before Vice-Chancellor *Giffard* (1).

No steps having been taken under this order, the solicitor of *Rhys* and *Richards*, on the 14th of August, 1868, wrote to *Clutton* to ask when he would be ready to proceed with the arbitration. An answer was returned by a clerk of *Clutton* on the 24th of August, stating that *Clutton* was absent in *Scotland*, but would be ready to proceed with the matter in November, and asking the solicitor to arrange with the railway company for a meeting in that month. Nothing more appeared to have passed until, on the 5th of February, 1869, nothing having been done under the order, *Rhys* and *Richards* served the railway company with notice of their desire to have the question of compensation settled by a special jury. The company then required the claimants to proceed on the order of the 9th of July, to which they replied that no valid award having been made, and more than three months having elapsed since the reference to the umpire, it was imperative, under the *Lands Clauses Act*, that the compensation should be assessed by jury; consequently, that if within twenty-one days from service of the notice under sect. 68, on the railway company, the

(1) Law Rep. 6 Eq. 429.

L. JJ. 1869

In re DARE VALLEY RAILWAY CO.

warrant were not issued, an action would be brought to recover the full amount.

The company filed their bill at the Rolls against *Rhys* and *Richards* to restrain this action. A demurrer was put in, and on the 8th of March, 1869, the Master of the Rolls allowed the demurrer with costs. On the 17th of March the Lord Chancellor dismissed an appeal from the order of the Master of the Rolls, being of opinion that by virtue of the order of the 9th of July, 1868, the original award was a mere nullity, and that no award having been made within the three months limited for that purpose by the *Common Law Procedure Act*, 1854, the Defendants were entitled, by virtue of sect. 23 of the *Lands Clauses Act*, to take the course they had taken, unless the Court should extend the time for making the award under the order of the 9th of July, 1868, his Lordship intimating his opinion that the award having been made a rule of Court it fell within the operation of the *Common Law Procedure Act*, 1854, and that an application might still be made to the Vice-Chancellor to enlarge the time for making the award.

The company accordingly gave notice of motion to the effect set out above. Vice-Chancellor *James* was of opinion that he had jurisdiction to enlarge the time; but that after the delay which had occurred this jurisdiction ought not to be exercised so as to deprive the Respondents of their right to have the question tried by a jury if they wished to have it so tried, and would waive their right under sect. 68 of the *Lands Clauses Act* to recover the full amount claimed. The Respondents acceding to this condition, an order was made for the company to summon a jury and pay the costs of the application (1). The company appealed.

(a) 4 W.R. 65.

(1) The judgment of the Vice-Chancellor was as follows:—

SIR W. M. JAMES, V.C.:—

This case has been very fully argued, and if I thought I could derive any assistance from delaying my judgment, I should not give it at the present moment. But, having attended very carefully to everything that has been suggested on both sides, I have arrived at the conclusion that the better construction is, that this Court has jurisdiction to refer the matter back. The 5th section of the *Common Law Procedure Act*, which is later in date than the *Lands Clauses Act*, contains these words: "It shall be lawful for the arbitrator, upon any compulsory reference under this Act, or upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the Superior Courts of Law or Equity," to do certain things;

Mr. *H. Matthews*, Q.C., and Mr. *Leonard Field*, for the appeal motion:—

The case is governed by the *Common Law Procedure Act*, 1854, and not by the *Lands Clauses Act*, independently of that statute.

---

and then there are certain further provisions following. That is followed by sect. 8: "In any case where reference shall be made to arbitration as aforesaid, the Court or Judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said Court or Judge may seem proper." There are other provisions (sect. 15) enabling the Court to enlarge the time for arbitration.

Now is there any reason why the Court should not apply those powers to references under the *Lands Clauses Act*? I am of opinion that no sufficient reason exists for so limiting the construction of the *Common Law Procedure Act* as to hold that it does not apply to matters and things referred under the *Lands Clauses Act*. It is to be borne in mind that it is not a mere question of valuation only which is the subject matter of the *Lands Clauses Act*. The words used in the Act are: "Where any question of disputed compensation under this Act is authorized or required to be settled by arbitration;" and then sect. 26 says that "if before the matters so referred be determined the arbitrator shall die;"—then certain consequences shall follow. Therefore, in truth, the *Lands Clauses Act* does deal with it as a reference of disputed compensation to a particular tribunal. There are many cases in which compensation for wrong done after the railway was constructed may have to be dealt with under that machinery. Then it is in terms a reference by consent of the parties, because the *Lands Clauses Act* makes the appointment of the arbitrator a submission to arbitration, and apparently has made it so for the purpose of introducing these words—"a reference by consent of the parties." It is a submission, or, in other words, a reference by consent, which reference by consent of the parties is to be made by another section of that Act a rule of Court. It has been determined that sect. 8 of the *Common Law Procedure Act* does apply to a case under an Act very similar to this: *In re Ward* (11 W. R. 88).

I really do not see exactly how that case differs in principle from this. It was a reference of the amount of compensation to be paid, and was simply as much a valuation or question of compensation as the matter before me; and there, after full discussion, the Court of Queen's Bench unanimously came to the conclusion that sect. 8 of the *Common Law Procedure Act* did apply. And I am certainly not indisposed to attach weight to the fact, although the matter was not argued before my predecessor, that the order in this very case of the 9th of July, 1868, can certainly not be justified in the language in which it was made, referring the matter back to the same umpire, unless there was power under the *Common Law Procedure Act* to do it. I am dealing, in fact, with an order which has never been set aside, which has never been questioned by any appeal or otherwise, and which proceeds entirely upon the assumption that all the sections of the *Common Law Procedure Act* with regard to references do

L. JJ. 1869 *In re* DARE VALLEY RAILWAY CO.

In re Lord (1); *In re Anglo-Italian Bank and De Rosaz* (2). There has been no sufficient notice calling on the umpire to act under the *Common Law Procedure Act*, 1854, s. 15, so it is at least questionable whether the time for making the award has expired, but if it has, the Court has jurisdiction to enlarge it under that section: *Lord* v. *Lee* (3); *In re Warner and Powell's Arbitration* (4); and the case is one in which this jurisdiction ought to be exercised.

Mr. *Kay*, Q.C., and Mr. *Freeling*, *contrà*, were not called upon.

SIR C. J. SELWYN, L.J.:—

I think we ought not to call upon the Respondents in this case. In the first place I entirely agree with the learned Vice-Chancellor in the judgment which he has delivered as to the jurisdiction of the Court, and I think it therefore unnecessary to go through the sections of the Acts of Parliament which are there referred to. But assuming the Court to have the power to make such an order as the Appellants ask for, the application is made to the discretion of the Court, and the first difficulty in their way is that which

---

apply to such a reference as has been made in this case. Being, therefore, of opinion that the case comes within the words of the Act of Parliament—seeing no reason in principle why the Court should not be trusted with the jurisdiction to send back to arbitrators or an umpire a reference under the *Lands Clauses Act* as well as any other reference, and seeing that there is nothing, as it seems to me, in those parts of that Act of Parliament which cannot well consist with the *Lands Clauses Act*, I think that the sounder construction is the liberal one, viz., to hold that the Court has jurisdiction to make the order which is asked.

But then comes the question whether the Court ought to exercise the jurisdiction in this case by sending it back to the same arbitrator after all this lapse of time, or sending back at all, and I think after this delay I should not be disposed to deprive the party of his right to have the question determined by another tribunal—that is, by a jury, if the parties are willing to have it so tried. I certainly would not, if I can help it, and I do not wish, by reason of mistake as to their legal position, to leave the railway company in the position in which they are with regard to sect. 68, if nothing is done upon this motion. I shall therefore make an order enlarging the time for three months for making the award, unless the Respondent consents to waive his right under sect. 68, and allow the matter to be tried by a jury.

(1) 1 K. & J. 90.
(2) Law Rep. 2 Q. B. 452.
(3) Ibid. 3 Q. B. 404.
(4) Ibid. 3 Eq. 261.

always meets those who ask the Court of Appeal to interfere with the exercise of a discretionary power vested in the Judge of the Court below. This Court is always reluctant to interfere in such cases, but, speaking for myself, I may say that even if this matter had come before us originally, and if we had been called on to exercise our discretion in the first instance, I should have come to the same conclusion as that at which the learned Vice-Chancellor has arrived. If the landowners had been insisting upon a right to recover the whole sum of £3500 the matter would have stood very differently, but both before the Vice-Chancellor and before us the landowners have waived any such claim, and they only desire that the compensation should be ascertained by a jury; the question, therefore, is merely between one mode of trial and another. The whole proceeding is based upon the *Lands Clausee Act*, and whether the 23rd section of that Act does or does not in strictness apply to the case of an award referred back for the reconsideration of the arbitrator, it must, in my judgment, have a material influence on the mind of the Court in considering how its discretion ought to be exercised in a case of compensation arising originally under that Act. Now the 23rd section clearly shews that in the view of the Legislature the parties are bound to proceed with diligence under a reference to arbitration, and it provides that where for any reason proceedings under a reference have failed, then a trial by jury shall be substituted. Now in the present case there has been a considerable lapse of time, and it appears that matters have got into such a condition that there, no doubt, would be considerable difficulty and embarrassment in proceeding with the reference. Under those circumstances it appears to me that it would not be right for us in the exercise of our discretion, and especially where the Vice-Chancellor has arrived at an opposite conclusion, to make an order the effect of which would be to do the very opposite of that which is provided for by the 23rd section, and prevent the trial of this question by a jury. It is said that the company are not in any degree responsible for the delay which has taken place, and it is also said that they were ignorant of the letters of the 14th and 24th of August. Admitting that, it must then be taken that they did nothing at all from the date of the order of my learned brother sitting as Vice-

L. JJ. 1869 *In re* Dare Valley Railway Co.

Chancellor, that they made no inquiry upon the subject, but were simply passive. They endeavour to justify this by saying that they were in the position of Defendants opposing the claim, and therefore were not called upon to be active in urging on proceedings which would certainly result in something being found due from them in respect of compensation and of costs. But, on the other hand, it must be considered that the arbitrator had made an award which was in substance an award in their favour; and, if they were desirous of exercising the right which it has been argued they possess, of having the arbitration proceeded with in such a manner as to exclude the right of the claimants to a trial by jury, I think it was incumbent upon them to take some step or proceeding to enforce that right. They do nothing at all, they make no inquiry, they allow this great lapse of time to take place, and then they come before this Court and ask us to interfere and exercise our discretion by preventing a trial by jury. In my judgment that would be an improper interference on the part of this Court. I think, however, that the undertaking which was given by the landowners in respect of their making no claim for the surface must be continued, and also the undertaking not to proceed with the action for £3500. Those undertakings being given, I think the costs of this appeal motion must be borne by the parties moving.

Sir G. M. Giffard, L.J.:—

I quite agree with the view the Vice-Chancellor has taken of the construction of the *Common Law Procedure Act;* and I have no doubt that we have jurisdiction to enlarge the time for making the award. The question, then, is, whether this is a proper case in which to exercise it. The case stands in a very different position from that in which it stood when it was before me as Vice-Chancellor in July, 1868. On that occasion I thought the award bad, but rather in the interest of the railway company I gave them an opportunity of going before the arbitrator again. That was in July, 1868, and from that day to the present they have taken no step to prosecute the matter before the arbitrator, and by their own want of diligence they have brought the matter to such a

state that they think it necessary to apply to the Court for its indulgence. An application for indulgence is, of course, an application to the discretion of the Court; and when the Court below has exercised its discretion, I should be exceedingly reluctant to interfere with that discretion; I certainly should never do so unless upon some question of principle I felt bound to come to the conclusion that that discretion had been wrongfully exercised. I cannot at all say, in this instance, that it has been exercised wrongly, because after this lapse of time it is rational to suppose that the parties would think it desirable to have all the evidence over again, and a complete re-discussion, and would not like to trust to what the recollection of the arbitrator might be. The real difference in the costs cannot be very great; and I do not consider that the company in going to a jury are paying too high a price for the undertaking given by the claimants to stay their action for the £3500. The motion must be refused with costs.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Vizard, Crowder, & Co.*

In re ROBERTS' TRUST.

Appeal Petition—Certificate of one Counsel.

Leave will not be granted to present a Petition of appeal with the certificate of only one counsel, merely on the ground that one counsel only appeared for the Appellants in the Court below.

MR. *WILLIS* applied for leave to present a Petition of appeal with the signature of one counsel. The Appellants were trustees who had paid money into Court under the *Trustee Relief Act*, and had been ordered to pay all costs occasioned by their so doing. One counsel only had appeared for them in the Court below. He referred to *Knowles* v. *Greenhill* (1) and *Re Midland Counties Benefit Building Society* (2).

(1) 30 L. J. (Ch.) 670; 5 L. T. (N.S.) 166.
(2) 10 Jur. (N.S.) 691. 4 De G. J. & S. 460

L. JJ. 1869 *In re* ROBERTS' TRUST.

SIR C. J. SELWYN, L.J.:—

We are not prepared to lay down the general principle that in every case in which a party has appeared by one counsel only in the Court below he can appeal on the certificate of only one counsel. In the cases where such an appeal has been admitted, there has been some other circumstance, as the poverty of the Appellant, or the extreme smallness of the property in dispute. The present appeal seems to turn only on a matter of costs, and does not come within the principle of the cases in which the permission now asked has been given. The application must be refused.

Solicitor: Mr. *R. Chandler.*

L. JJ. 1869 *April* 4, 5, 6; *May* 29.

EARL BEAUCHAMP *v.* WINN.

Grant—Words of Description—"Warren of Conies."

The grant of a "warren" by a person who is both owner of the soil and has a right of free warren in it may pass an estate in the soil if the context of the instrument shews the intention to be such, but that is not its *primâ facie* construction. *Co. Litt.* 5 b. (*b.*) explained.

By a grant from the Duchy of *Cornwall*, in 1799, certain closes of land, and "all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever, in *Bromby*, and all that lodge or house thereupon built, commonly called *Bromby Lodge*; and all that warren of conies in *R.*, both which said warrens of conies are known by the name of *Bromby* warren, and extend themselves in and over the wastes of *Bromby*, &c.," were granted to a person from whom the Plaintiff claimed. The duchy was entitled to the soil of the wastes, and to a right of free warren in them:—

Held, that the context did not enlarge the meaning of the words "warren of conies" so as to make it pass anything more than a right to the conies, and whatever was fairly incident to, or necessary for, the preserving and making profit out of them.

Decree of the Master of the Rolls affirmed.

THIS was an appeal by the Plaintiff from a decree of the Master of the Rolls dismissing his bill. The question was, whether the soil in the *East Common* of *Bromby* passed under a grant, dated the 27th of March, 1799, from the Duchy of *Cornwall* to *Thomas Pindar*, under whom the Plaintiff claimed. The material words

of the grant were: "All that piece or parcel of wood-land situate in *Bromby*, within the county of *Lincoln*, commonly called *Prince's Woods*, containing by admeasurement 23A. 1R. 11P. or thereabouts; and all that close or parcel of pasture land situate at the east end of the said woods, and commonly called wood and close, containing by admeasurement 4A. 3R. 24P. or thereabouts; and all that *warren of conies*, with all and singular the rights, members, and appurtenances whatsoever, in *Bromby* aforesaid, and that lodge or house thereupon built, commonly called *Bromby Lodge*, and all that *warren of conies*, with all and singular the rights, members, and appurtenances whatsoever, in *Redbourne*, in the said county of *Lincoln*, both which said warrens of conies are now commonly called or known by the name of *Bromby Warren*, and do extend themselves in and over the wastes or eastmoores of *Bromby*, *Frodingham*, *Scunthorpe*, and *Ashby*, in the said county of *Lincoln*, which said several premises are parcel of the lordship and soke of *Kirton* in *Lindsey*, in the said county of *Lincoln*, and parcel of the possessions of the Duchy of *Cornwall*, and were last demised, together with the fishery of the River *Trent*, by His present Majesty King *George* III., by letters patent under his Exchequer Seal, bearing date the 15th day of August, in the year of Our Lord 1777, unto *Robert Pindar*, of *Bromby Hall*, in the said county of *Lincoln*, clerk, since deceased, for a reversionary term of nineteen years, to commence from the 13th day of July, 1788, under the several yearly rents of 20*s.* for the said woodlands, and £3 7*s.* 4½*d.* for the said coney warren. And also all houses, edifices, structures, timber trees and other trees, mines, quarries, waters, watercourses, roads, ways, easements, profits, commodities, privileges, advantages, emoluments, and hereditaments whatsoever in or upon the said woods and lands, and the said warren and warrens of conies growing or arising to the same, in anywise belonging or appertaining, at or for the price or sum of £800 of lawful money of *Great Britain*, to be paid by the said *Thomas Pindar* within forty days from the date of this certificate of contract into the *Bank of England* and carried to the account of the Duchy of *Cornwall*. And from and immediately after the payment of the said sum in manner aforesaid, and the inrolment of this certificate and the receipt for the said purchase-money in the office of the auditor of the

L. JJ. 1869

EARL BEAUCHAMP v. WINN.

Duchy of *Cornwall*, and thenceforth for ever, the said *Thomas Pindar*, and his heirs, successors, or assigns, shall be adjudged, deemed, and taken to be in the actual seisin and possession of the said woodland and pasture ground, warrens and premises so by him purchased, and shall hold and enjoy the same peaceably and quietly, in as full and ample manner, to all intents and purposes, as His said Royal Highness the Prince of *Wales*, his heirs or successors, Dukes of *Cornwall*, might or could have held and enjoyed the same. By force and virtue of an Act of Parliament passed in the 38th year of the reign of His Majesty King *George* III., intituled 'An Act for making perpetual, subject to the redemption and purchase in the manner therein stated, the several sums of money now charged in *Great Britain* as a land tax for one year from the 25th day of March, 1798.'" The other facts of the case sufficiently appear from the judgment of the Court.

Mr. *Jessel*, Q.C., and Mr. *Walford*, for the Plaintiff, in support of the appeal:—

The duchy had the soil and also a right of free warren under the charter set out in *The Prince's Case* (1). The words "warren of conies" in the grant from the duchy pass the soil. There is no such thing at common law as a right of warren of conies. The only right of that kind known was a right of warren, and "a warren of conies" must denote the place. This is made more clear by the reference to a lodge as built upon it. The word "warren" is always used in Acts of Parliament as denoting the place, and such is its ordinary construction in grants: *Co. Litt.* (2); *Rice* v. *Wiseman* (3); *Sheppard's* Touchstone (4); *Jacob's* Law Dictionary (5); *Termes de la Ley*, "Warren"; *Blackstone's* Commentaries (6). The reservation of rent out of the warren in this case, shews that the soil was included, for a rent cannot be reserved out of an incorporeal hereditament: *Co. Litt.* (7). *Marshall* v. *Ulleswater Steam Navigation Company* (8) is a strong authority in our favour. The 38 Geo. 3, c. 60, under which the sale was made to the Plaintiff's

(1) 4 Rep. part 8, p. 145.
(2) 5 b (*b*).
(3) 1 Roll. Rep. 259; 3 Bulstr. 82.
(4) Pages 96, 98.
(5) Page 1736.
(6) Vol. ii. p. 39.
(7) 47 a.
(8) 3 B. & S. 732.

predecessor in title, only authorizes the sale of "tenements" and does not authorize the sale of a right of warren.

Sir *Roundell Palmer*, Q.C., Mr. *Mellish*, Q.C., Mr. *Speed*, and Mr. *Jeune*, for the Defendant:—

Warren of conies is less than the entire warren, and there is not a trace of authority that a grant of it will pass the soil, the grantor not even professing to part with the whole warren: *Coke*, 4th Inst. (1); *Viner's* Abridgment, "Warren;" *Case of Forests* (2); *Davies' Case* (3). The warrens are said here to "extend themselves over" the wastes, which is inapplicable to the soil. There is no such mistake as to induce the Court to interfere, there being no misrepresentation nor fiduciary relation: *Cocking* v. *Pratt* (4); *Ramsden* v. *Hylton* (5). The case of *Bingham* v. *Bingham* (6), which is recognised in *Cooper* v. *Phibbs* (7), is quite different from the present, where the Plaintiff's vendor, who must have known what he bought, always proceeded on the view that he had bought a right of warren and not the soil.

[*Morris* v. *Dimes* (8), and *Rex* v. *Inhabitants of Piddletrenthide* (9), were also referred to.]

Mr. *Walford*, in reply.

May 29. SIR G. M. GIFFARD, L.J.:—

The judgment I am about to deliver is the judgment of the Court.

Earl *Beauchamp*, the present Appellant, and sixth Earl, claims through *Henry* the fifth Earl. He has appealed from a decree of the Master of the Rolls dismissing, with costs, first, the original bill in this suit, which was filed by the fifth Earl; and, secondly, the supplemental bill which he himself filed.

The questions in the suit arise in the following way:—In October,

(1) Page 314.
(2) 6 Rep. part 12, p. 222.
(3) 3 Mod. 246.
(4) 1 Ves. Sen. 400, Supplement, 176.
(5) 2 Ves. Sen. 304.
(6) 1 Ibid. 126.
(7) Law Rep. 2 H. L. 149.
(8) 1 Ad. & E. 654.
(9) 3 T. R. 772.

L. JJ.
1869
EARL BEAUCHAMP v. WINN.

1864, *Henry* the fifth Earl and the Defendant agreed to exchange certain lands and hereditaments, with the rights and privileges belonging thereto. These lands and hereditaments were severally specified in two schedules appended to the agreement. The agreement itself consisted of six articles, and the Earl was to pay, by way of equality of exchange, £3400 to the Defendant. The first schedule contained a description of the lands and hereditaments to be given in exchange by the Earl. They were as follows:—First, 162½ acres in the parishes of *Frodingham*, *Bottesford*, and *Ashby*; secondly, freehold common rights on the *East Common* of *Bromby*; thirdly, all the right or stray of rabbits or right of warren in the said *East Common*, with the appurtenances. The second schedule contained a description of the lands and hereditaments rights and privileges to be given in exchange by the Defendant; they were 55A. 2R. 29P., lying in *Bromby*; secondly, all the freehold common rights, or other rights, interests, or property in and upon the *West Common* of *Bromby*; thirdly, all the freehold moorland in *Bromby* moors, as set out by boundaries, containing 186 acres or thereabouts; fourthly, a tithe rent-charge payable out of the estate of the Earl to the Defendant; fifthly, a fee farm rent of £7 2*s.* 6*d.*, payable out of the estate of the Earl to the Defendant; sixthly, the right and privilege of the exclusive use for twelve years of the warping sluice to the Defendant; seventhly, all the right and interest of the Defendant, as lord of the manor of *Bromby*, in all that portion of the *East Common* in *Bromby* which lies to the west side of the public carriage road, amounting to 115 acres, or if less, to be made up to that amount. The agreement was duly executed, and possession given accordingly, since which time acts of ownership have been exercised by the parties on the properties so exchanged. There have been no conveyances. In 1865, the late Earl and the Defendant promoted the inclosure of the *East* and *West Common* of *Bromby*; in November of that year the late Earl sent in his claim to the Inclosure Commissioners, and in December, 1865, with a view to substantiate that and another claim, search was made amongst the Earl's deeds and muniments of title at the family seat: when, on considering a deed of grant from the Duchy of *Cornwall*, it appeared, as the Plaintiff alleges and insists, that the *East Common* of *Bromby*, and the mines and minerals thereunder and under certain lands in

Frodingham and *Scunthorpe*, were, by a grant of the Duchy of *Cornwall*, dated the 27th of March, 1799, conveyed to *Thomas Pindar* his heirs and assigns for ever. It is not disputed that all the property belonging to *Thomas Pindar* in this district passed from him to the Earls *Beauchamp*, was possessed by the late Earl, and is the property of the present Earl. The Defendant denies that the soil of the *East Common* of *Bromby*, and the mines and minerals thereunder, or under the lands of *Frodingham* and *Scunthorpe*, were conveyed by the grant of the 27th of March, 1799, to *Thomas Pindar*. On the contrary, he alleges that they were conveyed by a grant of the manor of *Kirton* from the Duchy of *Cornwall* to Mr. *Angerstein*, on the 9th of July, 1799, and that *Bromby*, *Frodingham*, and *Scunthorpe* are part of the manor of *Kirton*. The Defendant claims through Mr. *Angerstein*.

It is plain that all parties acted on the assumption that the soil in the *East Common* of *Bromby*, and the mines and minerals under it, and the mines and minerals under the lands in *Frodingham* and *Scunthorpe*, belonged to the Defendant, and did not pass by the grant of March, 1799. This, the Appellant alleges (as the fifth Earl did before him) to have been a common mistake. He avers that the mines and minerals are of very great value, that in substance he gets by the exchange that which was really his without it, and therefore he asks the Court either to rectify the agreement or to nullify the transaction and set it aside.

It needs no argument to prove that the Court has jurisdiction to set aside an agreement on the ground of mistake; but, as a general rule, the mistake must be plain and palpable; one as to the existence of which opinions can scarcely differ, and it must be possible to replace the parties in that which was substantially their original position. In the present case, the rights of the parties have been assumed to be such as formed the foundation of the exchange during a period of sixty years preceding the present dispute. In 1801, an Inclosure Act, the Act of 41 Geo. 3, c. 74, was passed. Under that Act an allotment was made to *Thomas Pindar* for his right of warren, and to Mr. *Angerstein* for his right of soil in certain commons of the manor of *Kirton*. Again, in 1831, another Inclosure Act was passed; no doubt was entertained as to the relative rights and positions of the Defendant and the then Earl of *Beau-*

L. JJ. 1869 EARL BEAUCHAMP v. WINN.

champ, the Defendant being treated and considered as entitled to the soil, the Earl to the right of warren as distinguished from the soil. The several transactions under both Acts are detailed in the answer to the original bill; they have been frequently read and commented on, and having regard to these, as well as to other transactions also mentioned in the same answer, it is difficult to see any just or sufficient grounds for a suit of this description. It is clear, on the Plaintiff's evidence, that the existence of valuable minerals under the lands in question was known to the fifth Earl and his advisers before the date of the agreement for exchange. It is as reasonably certain as anything can be that the grant of March, 1799, was never supposed, either by grantor or grantee, or by any one, until some sixty years after its date, to have had the effect now sought to be attributed to it, and unless that effect is plain almost to demonstration, and the true construction of the instrument so certain, and the rights of the parties under it so indisputable as not to be open to serious controversy, we should not hesitate in coming to the conclusion that the suit was rightly dismissed.

These considerations lead to a review of the arguments adduced on behalf of the Appellant as substantiating that construction of the grant on which he has been advised to rely. They may be summarized, so far as is necessary, thus: First, *The Prince's Case* (1), was referred to. The charter constituting the grant of the duchy is there set forth, and the following passage, being the grant of free warren, was read (2), viz.:—"We have, moreover, for us and our heirs, and by this our charter we have confirmed to the aforesaid Duke, that the said Duke and the heirs of him, eldest sons Dukes of the same place for ever, have free warren in all the lordships, manors, castles, lands, and other places aforesaid, so as the said lands be not within the bounds of our forests, and that none enter into them to hunt in them or to take anything which to warren appertaineth without the license and will of the said Duke or other Dukes of the same place, upon pain of forfeiture of £10."

Next the following passage in *Coke* upon *Littleton* (3) was cited: "So it is of a forest, parke, chase, vivarye, and warren in a man's owne ground, by the grant of any of them not onely the priviledge

(1) 4 Rep. part 8, p. 145. (2) 4 Rep. part 8, p. 161.
(3) 5 b (*b*).

but the land itselfe passes, for they are compound." It was stated that this passage was not known, or, at all events not cited, in the Court below. *Sheppard's* Touchstone, and other works of authority were also referred to, as recognising and repeating the law laid down in *Coke* upon *Littleton*, and the case of *Rice* v. *Wiseman* (1) was cited, and it was said that inasmuch as the soil belonged to the duchy, it followed on these principles that it passed under the term "warren," and furthermore, that this view was fortified by the context of the grant, and especially by the words "all and singular the rights, members, and appurtenances whatsoever in *Bromby* aforesaid, and that lodge or house thereupon built," and the words "commonly called or known by the name of *Bromby* warren," and a series of leases was referred to commencing in the time of *Henry* VIII, and ending with the lease of 1777 mentioned in the grant. It was urged, in addition to these arguments, that the 38 Geo. 3, c. 60, under the authority of which the grant was made by the duchy, did not authorize the sale of such a thing as a right of warren as distinct from the soil, but only the sale of a "tenement," not of a "hereditament," that the authority given by the Act must be taken to have been followed, and therefore that the grant on the occasion of the sale must be taken to be a grant of the soil with its incidents. It may be well to deal with these authorities and arguments (omitting only those founded on the context of the grant) before going to the exact terms of the grant itself. They can be, and, in fact, have been, completely answered.

First of all, both the charter referred to as granting the free warren, and the leases, establish that there was a right of free warren in gross, belonging to the Duchy of *Cornwall*, and extending over *Bromby* and other places. There is no ground in law for saying that a person having a right of free warren generally may not grant a limited right by the grant of "a warren of conies," nor because the term "warren of conies" is used in the leases and in the grant of 1799, and the expression so used differs from the grant in the charter, is an intention to pass an estate in the soil to be inferred. "Warren of conies" is not so extensive as "free warren," the term itself was obviously taken from the leases, particularly that of 1777, and probably originated in the fact of

(1) 1 Roll. Rep. 259; 3 Bulstr. 82.

L. JJ. 1869

EARL BEAUCHAMP v. WINN.

the "conies" being in that locality the only beasts, or, at all events, the only beasts of warren, of any value. The terms of the charter, therefore, do not advance the Appellant's case.

With respect to the passage from *Coke* upon *Littleton*, Mr. *Preston*, in his edition of *Sheppard's* Touchstone, adds to the passage, very significantly, this observation, "generally without any qualification or context." The passage uses the term "warren" generally. The primary signification of that word when speaking of a "right of warren," or "of free warren," or when speaking of "a warren of conies," most assuredly does not mean an estate in the soil. A grant of land or of a manor according to the authorities does not pass a right of free warren. A number of Exchequer decrees and proceedings have been quoted, shewing the use of the term "warren" in connection with terms of locality; from these it is manifest that the use of the word "warren," and more especially of the words "warren of conies," does not necessarily, or usually, or according to any primary acceptation, mean an estate in the soil. To warren of every description there must be a local boundary, and it is impossible, in our opinion, to attribute any other weight or meaning to the passage than that "warren" *may* be so used as to mean to pass, and may pass, an estate in the soil, provided the context of the instrument in which it is so used shews that to be the intention. Then the case of *Rice* v. *Wiseman* appears from the reports to be this:—[His Lordship stated the case in full from 3 Bulstr. 82.] The action, as is plain from the report of the case, did not involve any question of the right to the soil, and Lord *Coke* is reported as plainly admitting that the demise or grant of a warren in a particular locality, as "in his park," does not pass the soil.

There then remains the question said to arise on the Act 38 Geo. 3, c. 60. It is plain that the Act confers a power to sell the two things combined—"land" and "right of warren," the greater must necessarily include the power to sell the less, that is, the "warren," or part of "the warren." The estate and interest of the duchy in the soil was the manorial estate and interest in the wastes or commons, the tenants having rights as to the surface; and if the terms of the grant, according to their fair construction, do not convey the soil, they can have no artificial or technical meaning because

of the extent or nature of the power conferred by the Act. Moreover, a right of warren is a tenement, as shewn by the authorities (1) which were referred to by the Master of the Rolls. The leases do not support the Appellant's case to any greater degree than they do that of the Respondent; they are, to say the least of them, but of doubtful import, and this being so, the question resolves itself into this, viz. what is the true construction, intent, and meaning of the terms and expressions used in the grant? Those terms and expressions, as far as they are material, are these: "All that piece or parcel of wood-land situate in *Bromby*, within the county of *Lincoln*, commonly called *Prince's Woods*, containing by admeasurement 23A. 1R. 11P. or thereabouts." Here there is a plain description of soil. Then, "and all that close or parcel of pasture land situate at the east end of the said woods, and commonly called wood and close, containing by admeasurement 4A. 3R. 24P. or thereabouts." Here, again, there is a plain description of soil. Then, "And all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever, in *Bromby* aforesaid," this being a warren of conies with a locality. And then "that lodge or house thereupon built, commonly called *Bromby Lodge*." And then, "All that warren of conies, with all and singular the rights, members, and appurtenances whatsoever, in *Redbourne*, in the said county of *Lincoln*." Again, a warren of conies with a locality. And then, "Both which said warrens of conies are now commonly called or known by the name of *Bromby Warren*, and do extend themselves in and over the wastes or eastmoores of *Bromby*, *Frodingham*, *Scunthorpe*, and *Ashby*, in the said county of *Lincoln*, which said several premises are parcel of the lordship and soke of *Kirton* in *Lindsey*, in the said county of *Lincoln*, and parcel of the possessions of the Duchy of *Cornwall*, and were last demised, &c. [His Lordship read to the end of the grant as set out above.]

The demise of 1777 referred to in the grant contains a description similar in terms to that which I have read from the grant, and it contains this reservation or exception, "excepting nevertheless, and always reserving to us, our heirs and successors, all timber trees and all fair sapling oaks apt to become timber; and also

(1) Co. Litt. 6 a, 19 b; 2 Bl. Com. 16; Shep. Touch. 91; *Gully* v. *Bishop of Exeter* (4 Bing. 290).

L. JJ. 1869 — EARL BEAUCHAMP v. WINN.

all mines and quarries of and in the said premises, which said premises are parcel of the lordship and soke of *Kirton*, in *Lindsey* aforesaid, and parcel of the possessions of the Duchy of *Cornwall*," and the rent is reserved as follows, under the several yearly rents following, that is to say, "for and out of" the woodland the sum of 20*s.*, "for" the coney warren the sum of £3 7*s.* 4½*d.*, and "for" the fishery the sum of 10*s.*; and there is a covenant to keep the coney warren stocked and stored with a sufficient number of conies, and a provision for the lease to become void in the event, amongst other things, of default being made in payment of the rents or any of them, and a proviso for re-entry and resumption of the premises.

The lease follows the description in former leases; two only have been produced in which the "warren of conies" was alone leased without lands being in terms leased with it. In those there was no reservation of mines and minerals.

The first observation that occurs is, that there is no grant of moors or wastes; the next, that where land is intended to be granted, the grant and description are unmistakable and explicit; the next, that there is not a grant of "the warren" *simpliciter*, but of "all that warren of conies" with a fixed locality, that is, as regards the first, "in *Bromby* aforesaid," as regards the second in *Redbourne*. Both are further stated to be "commonly called or known as *Bromby Warren*, and to extend over certain wastes or eastmoores." There is not, as has been before said, any grant of the wastes or eastmoores; the grant of a warren of conies is essentially a grant of the conies, and the right to take and kill the conies. A grant of a warren in a particular locality, as in a park, Lord *Coke* himself admits does not pass the soil, and here there is plainly nothing more. That the warrens are commonly "called *Bromby Warren*," and are situate in particular places, and extend over particular wastes or moors, in no way extends the meaning of the words "warren of conies" to an estate in the soil, and cannot either in technical legal language, or according to any rules or mode of construction, technical or untechnical, be held to have any such effect. The reservation of mines and minerals in the lease applies to the land plainly and actually demised; the rent is reserved *out* of the land, but *for* the warren, and as to the *addition* of "that house or lodge thereupon built, commonly called '*Bromby*

Lodge,'"—seeing that a lodge or house is incident to a warren, that this lodge always has been leased and dealt with in connection with the right of warren in question, and that "thereupon" may either mean "in *Bromby*," or built there for the purposes of the warren, or connected with or incident to the warren,—the addition is wholly insufficient to shew that an estate in the wastes or eastmoores was intended to pass. In fine, nothing of the kind was intended but "warren of conies," and "warren of conies" only, and whatever is fairly incident to or necessary for the exercise of the right of preserving and making profit out of conies.

There was yet another ground urged, on which it was said that the Appellant ought to succeed, viz., that the manor of *Bromby* was his, and that he had proved his title to it in the cause, as claiming through *Thomas Pindar*. It is plain, however, that it is part of the manor or soke of *Kirton*, that during the whole time Courts have been held in *Bromby* for the whole manor or soke of *Kirton*, and as plain that his application shewed no title to the wastes or moors of *Bromby*, or any act or right in any way excluding the rights of the lord of the superior manor. We do not think it necessary to go through the details which the Master of the Rolls referred to in his judgment as decisive on this part of the case.

On all these grounds, therefore, we are of opinion that the Appellant's case has wholly failed; that the real mistake has been the supposition that his rights have been mistaken; that the bills were properly dismissed with costs in the Court below, and that the appeal must likewise be dismissed with costs.

Solicitors: Mr. *Walford;* Messrs. *Baxter, Rose, Norton, & Co.*

L. JJ.
1869
May 25.

PETTY *v.* WILLSON.

Will—Construction—"Money"—Proceeds of Policy.

Testator gave to his wife "any money that he might die possessed of, or which might be due and owing to him at the time of his decease":—

Held (reversing the decision of *Stuart*, V.C.), that the moneys receivable under a policy of assurance on his own life to which the testator was entitled, passed under the above bequest.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*.

The testator by his will gave to his wife "all my stock in trade, household goods and furniture, plate, linen, china, prints, books, wines and spirits, and any money that I may die possessed of, or which may be due and owing to me at the time of my decease." The will contained a separate disposition of the testator's leasehold property, and did not contain any residuary bequest.

The testator at his death was entitled to a policy of assurance on his own life, by which £500 was assured to be paid to his legal personal representatives out of the funds of the assurance society six months after his death.

Vice-Chancellor *Stuart* decided that the money received on the policy did not pass to the widow under the above bequest, but was undisposed of. The widow appealed.

Mr. *Dickinson*, Q.C., and Mr. *Woodroffe*, for the Appellant, referred to *Stooke* v. *Stooke* (1).

Mr. *Greene*, Q.C., and Mr. *Everitt*, for the Respondents, referred to *Gosden* v. *Dotterill* (2); *Willis* v. *Plaskett* (3); *Lowe* v. *Thomas* (4); *Phillips* v. *Eastwood* (5); and *Stephenson* v. *Dowson* (6).

SIR C. J. SELWYN, L.J.:—

In this case, as in most cases on the construction of wills, we can derive but little assistance from decisions upon other wills, but the

(1) 35 Beav. 396.
(2) 1 My. & K. 56.
(3) 4 Beav. 208.
(4) 5 D. M. & G. 315.
(5) Ll. & G. 270.
(6) 3 Beav. 342.

case before Lord *St. Leonards*, so far as it has any bearing on the present, is in favour of the Appellant. *Stephenson* v. *Dowson* (1) was decided on a ground clearly explained by the Master of the Rolls in his judgment, namely, that the freight was not a debt due to the testator at the time of his death, because no debt accrued until the service which the testator had contracted to perform had been completed, which did not happen till after his death. I pass on to consider the words of the present will: "any money that I may die possessed of, or which may be due and owing to me at the time of my decease." It has been decided that stock does not pass under a gift of "money." But stock is only a right to receive an annuity, here the subject matter is a single sum of money payable under a policy, and it comes under the term "money," unless that word is restricted by the words associated with it. My impression is, that this testator considered money as divided into two classes, viz., money in possession and money due or owing, and that he did not intend to restrict the meaning of the word "money," but to say, "all the money I have power to dispose of, whether in my possession or not." I am of opinion, therefore, that this sum comes within the expression "money" as used in this will. But was it money due and owing to the testator at his decease? I am of opinion that it was, and that it would be too great a refinement to divide the moment of the testator's death, so as to say that a debt which accrued at his death was not owing at his death. It would be making a fanciful distinction to say that this money, which clearly forms part of the testator's estate, was not owing to the testator, because it could not, in any event, be paid to himself, but must be received by his representatives. The case in this respect differs but little from that of money owing to the testator on a promissory note and payable on a day which did not arrive till after his decease. I am of opinion, therefore, that this sum passed to the widow.

SIR G. M. GIFFARD, L.J.:—

The question is, whether the proceeds of the policy of assurance in question pass under the bequest to the testator's widow. They,

(1) 3 Beav. 342.

L. JJ. 1869 PETTY v. WILLSON.

primâ facie, come within the term "money," for the ordinary way of describing them would be money assured by a policy. I am of opinion that the testator did not intend to exclude from the bequest anything that would fall under the term "money," but that what he meant by the expressions he used was—all the money that he had in hand, and all money that might be coming to him. It would be much too refined to say that this money was not due and owing to him, because it was payable not to him but to his executors.

Solicitors: Mr. *W. Phillips*; Messrs. *Boulton & Sons.*

Ex parte BATES & REDGATE.

L. C.
1869
May 25.

Patent—Two Provisional Specifications—Sealing Patent—Priority—Patent Law Amendment Act, 15 & 16 *Vict. c.* 83, *ss.* 6, 9, 10, 23, 24.

Leaving a provisional specification and obtaining provisional protection does not prevent a second applicant from leaving a provisional specification of a similar invention, and obtaining valid letters-patent for the invention before six months have elapsed from the time when the first provisional specification was left; and in such a case, letters-patent will not be granted to the first applicant for any part of his invention which is covered by the letters-patent already obtained by the second applicant.

THE Petitioners, Messrs. *Bates & Redgate*, on the 2nd of October, 1868, left at the Patent Office a petition for a grant of letters-patent for an invention and a provisional specification, and thus duly obtained provisional protection.

One Mr. *Bertie*, on the 2nd of November, 1868, left a petition and provisional specification with respect to a similar invention, and obtained letters-patent for his invention on the 12th of December, 1868.

Messrs. *Bates & Redgate*, on the 19th of March, 1869, applied to the Commissioners for letters-patent; and now presented a Petition to have the Great Seal affixed to their letters-patent, and to have them dated as of the date of their provisional protection.

Mr. *Webster*, Q.C., and Mr. *Everitt*, for the Petitioners:—

We only ask to have the usual course followed, and to have our patent dated as of the date of the provisional protection, a course which is almost invariably adopted in sealing letters-patent, and which, at all events, can be adopted under the 23rd and 24th sections of the *Patent Law Amendment Act*, 15 & 16 Vict. c. 83.

If it is objected that we cannot have a patent because a patent for a similar invention is in existence, then we say that the Commissioners ought not to have allowed a second provisional specification for the same invention. We conceived ourselves to have six months within which to proceed, and if we were wrong there is no advantage in provisional protection, and inventors must hurry on as under the old law. The 10th section of the *Patent Law Amendment Act* meets the case.

L. C. 1869 *Ex parte* Bates & Redgate.

Mr. *Grove*, Q.C., and Mr. *T. Aston*, for Mr. *Bertie*:—

We have our letters-patent, and if they are bad, let them be repealed, but your Lordship cannot direct the Great Seal to be affixed to other letters-patent making them bear date before ours, and so invalidating the previous grant. Provisional protection is no grant of letters-patent, but is only a protection to the inventor from the consequences of his own publication, so as to prevent his workmen or others whom he may be obliged to communicate with from stealing a march upon him: *Oxley* v. *Holden* (1). We were independent inventors and have secured the first patent; there is no pretext for depriving us of our rights: *Ex parte Dyer* (2).

Mr. *Webster*, in reply.

Lord Hatherley, L.C.:—

The Legislature has directed that there should be specifications of two kinds, provisional and complete; but still the person who first procures the Great Seal to be affixed to his letters-patent is in the same position as a person who before the Act was passed had obtained a patent, and he holds it against all the world.

A person who intends to take out a patent having presented his petition may, under sect. 6 of the *Patent Law Amendment Act*, 15 & 16 Vict. c. 83, leave a provisional specification at the office of the Commissioners, and then he will have certain benefits. Under sect. 8, for instance, he may use his invention for six months without prejudice to his patent by that user, but he obtains no rights against the public until his patent has been sealed, and even then the patent will not relate back to acts done in the interval. He is only protected against the consequences of his own publication, and thus may employ workmen and obtain machinery without the risk of being betrayed. But that is all, and he has no right or privilege against any other person. If he wishes to have more, he may, under sect. 9, file a complete specification, and then he is absolutely protected for six months, and has a right to proceed as if he had a patent for that period. The publication of the complete specification gives to the world the whole benefit of the invention,

(1) 8 C.B. (N.S.) 666. (2) Parl. Pat. Rep. 1829, 197.

and then the inventor will be protected against any other person obtaining a patent for the same invention.

To make it more plain, sect. 10 says that any letters-patent granted to the true and first inventor shall not be invalidated by reason of any application in fraud of the true and first inventor, therefore the case is provided for, and if the applicant can be shewn in any way to have derived information from the first specification, that will be fraudulent, and he will be excluded by sect. 10 from any benefit.

But here there is nothing to prevent the first patent which was obtained from being the real patent. The inventor has proceeded with diligence, and has secured a patent against a person who might have been the first inventor.

Mr. *Webster* says that the Legislature intended to afford the inventor considerable advantages, and to give him time to frame a complete and accurate specification, that, in fact, the original injury in this case was in allowing the second provisional specification to be filed. But I can see no impropriety in the conduct of the law officer. If he received a second provisional specification he could not refuse to grant the statutory protection, unless he suspected that one was derived from the other, or that there had been fraud. There is nothing to compel the inventor who lodged the first specification to proceed with his invention, and if he does not, and no second specification was allowed, the invention might be lost. The second applicant must therefore have a right to his provisional protection. If not, the first applicant might within the six months lodge a second provisional specification, and so prevent any one else from obtaining a patent for an indefinite period.

If, then, there was no wrong in allowing the second provisional specification to be lodged, it would seem that in every respect the law remains as it was before the Act was passed, and the person who first obtains the patent will keep it.

Mr. *Webster* also complains that the first applicant is helpless during six months, but the second applicant is obliged to advertise his application, and the first applicant must ascertain from the title whether the second invention is likely to interfere with his own. If he had done so, and had applied to the Attorney-General, the sealing of the patent would have been stayed, but the first appli-

L. C. 1869 *Ex parte* Bates & Redgate.

cant took no such steps, and allowed the second applicant to obtain the first patent.

I ought not to ante-date the patent, and if granted it must be as of its proper date; but when one patent actually exists, and is brought to the notice of the Lord Chancellor, a second patent cannot be granted for the same invention. The first patentee has possession of all that is included in his patent, but if there is anything in the present applicant's invention which is not covered by the patent, he will have a right to a patent for so much; and, if necessary, an inquiry must be made on the subject, and the patent, if granted, will be dated on the 19th of March, when the application was made for the seal to be affixed. As this is a case of first impression, there will be no costs of this application.

Solicitors: Messrs. *Sampson, Samuel, & Emanuel;* Messrs. *Wilson, Bristows, & Carpmael.*

WILSON *v.* BELL.

L. JJ.
1869
June 24, 25.

Will—Precatory Trust—Direction to provide Residence and Maintenance.

A testator gave the residue of his personal estate to his son *T.*, and devised his real estate to *T.* for life, with remainders over, and appointed him sole executor. He then directed that his daughter *A.* should reside with, and be maintained by, *T.* so long as she should remain single and unmarried. *A.* lived sometime in *T.'s* house, and was maintained by him, but afterwards left of her own accord and resided with her brother-in-law. After *T.'s* death she made a claim against his estate for maintenance:—

Held (reversing the decision of *James*, V.C.), that *A.* was only entitled to maintenance so long as she resided with *T.*, he being willing to receive her; and that the obligation on *T.* to provide her with residence and maintenance did not extend beyond his life.

THIS was an appeal from a decision of Vice-Chancellor *James*.

Richard Bell, by his will, dated the 7th of July, 1849, bequeathed all the residue of his personal estate and effects to his son *Thomas Bell* absolutely, subject nevertheless to the payment thereout of all his debts, funeral and testamentary expenses, and the legacies thereinafter given; and the testator bequeathed to his son *George Bell*, and to each of his two daughters, *Eliza Wilson* and *Ann Bell*, the sum of £1000, and to each of his grandchildren, one of whom was *John Wilson*, the Plaintiff, the sum of £100, to be paid at the age of twenty-one; and the testator devised all his real estates to the use of his said son *Thomas Bell* and his assigns during his life, with remainder to his first and other sons in tail male, with remainder to the said *George Bell* for life, with remainder over; and the testator appointed his said son *Thomas Bell* the sole executor of his will, and then proceeded as follows:—"And I direct that my said daughter *Ann Bell* shall reside with and be maintained by my said son *Thomas Bell* so long as she shall remain single and unmarried."

The testator died on the 21st of August, 1852, and his executor, *Thomas Bell*, paid all the legacies except those given to the Plaintiff *John Wilson*, who had not attained the age of twenty-one years, and took possession of the real estate and the residuary personal estate. The testator was at the time of his death the owner of a house and farm at *Argam* in *Yorkshire*, where he resided with his

L. JJ. 1869 WILSON v. BELL.

family—and after his death his widow and his daughter *Ann Bell* continued to reside there. *Thomas Bell* lived at a farm which he occupied at *Grimdale*. In 1852, *Thomas Bell* married the Defendant *Maria T. Bell*. In October, 1855, the widow of the testator died; and on the 23rd of November following *Ann Bell* voluntarily left *Argam* and went to reside with her brother-in-law, *John Wilson*, near *Scarborough*, and *Thomas Bell* let the farm at *Argam*. Up to the time when the Plaintiff, *Ann Bell*, left *Argam* she was supported by her brother, but subsequently she received no maintenance from him.

In 1857, the Plaintiff *Ann Bell*, while residing with her brother-in-law *John Wilson*, applied to *Thomas Bell* to make her an allowance for maintenance under the will of their father; upon which *Thomas Bell*, by the advice of his solicitor, Mr. *Hodgson*, took counsel's opinion, who advised that he was not liable to make any allowance if she did not reside with him. Mr. *Hodgson* filed an affidavit in the suit, in which he said:—"I shewed the opinion to the said *T. Bell*, and, acting under his directions, I communicated the effect thereof to *John Wilson*, and told him that the said *T. Bell* would not make the Plaintiff *Ann Bell* any allowance, but that he would be very glad to make her a comfortable home if she thought proper to reside with him."

The Plaintiff, however, did not accept the offer, but continued to reside with her brother-in-law.

In February, 1868, *Thomas Bell* died, having appointed his wife, the Defendant *Maria T. Bell*, his executrix.

The present bill was filed by *J. Wilson*, the legatee, and *Ann Bell* against *Maria T. Bell*, praying for administration of the estate of *Richard Bell*, and that *Ann Bell* might be declared to be entitled to a charge upon the personal estate of the testator for maintenance so long as she remained unmarried, and that the amount of what was due for such maintenance might be ascertained and paid to her.

There was some conflict of evidence as to the circumstances under which the Plaintiff left *Argam*. The Plaintiff asserted that she only went to her brother-in-law's house for a temporary visit, and that she intended to return, but found it impossible to do so in consequence of the farm being let to a tenant. In her affidavit she also stated as follows:—

"It is true that I never expressed to the Defendant or my said brother any wish to reside with my said brother at his house in *Grimdale*; but it is untrue and without foundation that my said brother or his wife was ever willing that I should do so, or that my said brother was willing to provide a maintenance for me at his own house. It was always well understood both by my said brother and me, that owing to his wife's temper and feelings towards me it was quite impossible that I could reside in his house as directed by the will of our father, and he frequently admitted this in conversations between us after I left *Argam*."

On the other hand, the Defendant filed an affidavit, in which she said that *Thomas Bell* was anxious that the Plaintiff should continue to reside at *Argam* after her mother's death, and he offered to pay her £20 a year in addition to her maintenance if she would remain and look after the servants at the farm; but that she declined to remain.

The Vice-Chancellor was of opinion, upon the construction of the will, that there was a trust that *T. Bell* should provide the Plaintiff with residence and maintenance; and that she was now entitled to maintenance out of the personal estate of the testator, *R. Bell;* and he directed an inquiry as to the proper amount to be allowed, having regard to all the circumstances. The Defendant appealed from this decision.

Mr. *Karslake*, Q.C., and Mr. *Osborne Morgan*, Q.C., for the Appellant:—

There is no charge or trust created by the will for the maintenance of the Plaintiff which affects either the personal or real estate: *Thorp* v. *Owen* (1); *Winch* v. *Brutton* (2); *Abraham* v. *Alman* (3); *Macnab* v. *Whitbread* (4). The Plaintiff's brother had only a life interest in the real estate, and it would be unreasonable to suppose that the testator, in consideration of that, laid on him the obligation to provide for her maintenance during the whole of her life, for it is clear the testator did not expect her to marry. The direction to maintain and provide residence is indivisible. The direction applied to both brother and sister; he was to give

(1) 2 Hare, 607.
(2) 14 Sim: 379.
(3) 1 Russ. 509.
(4) 17 Beav. 299.

L. JJ. 1869 WILSON v. BELL.

her residence, and she was to give him the assistance of her service. The evidence distinctly shews that she declined to live with him, and he was, therefore, free from all obligation.

Mr. *Kay*, Q.C., and Mr. *W. Pearson*, for the Plaintiff:—

The obligation to provide residence and maintenance is divisible; if one part becomes impossible, the other remains. There is an express direction to maintain the Plaintiff, and there is a charge upon the personal estate, for it is included among "the legacies hereinafter given," and is also coupled with a charge upon *T. Bell's* interest as executor: *Connolly* v. *Farrell* (1); *Foley* v. *Parry* (2); *Messenger* v. *Andrews* (3). We deny that the Plaintiff ever refused to live with her brother. She only left *Argam* on a visit, and her brother then let the house, so as to prevent her returning to it.

SIR C. J. SELWYN, L.J.:—

In this case the difficulty arises mainly from the construction of a very few words in the will of *Richard Bell;* but the decision of the Court must also depend on the circumstances which have occurred since the death of the testator. In considering the terms of the will, it must be observed that the testator had already given to his daughter *Ann Bell* the same legacy of £1000 as to the other children, and that he had given the whole of his residuary personal estate to *Thomas Bell*, but had only given him a life interest in his real estate. Then follows the direction, that his daughter *Ann Bell* should reside with, and be maintained by, his said son *Thomas Bell* so long as she should remain single and unmarried. It is contended by the Respondent, that this is either a gift on a condition, or a trust. Assuming it to be a gift on a condition, or a trust, the Court has to inquire what it was that the testator required to be done.

If we look at the form of the clause, it is a direction that his daughter is to reside with her brother, and be maintained by him. She is directed to reside with him, and then the trust or condition is imposed upon him that if she did so he is to maintain her.

(1) 8 Beav. 347. (2) 2 My. & K. 138.
(3) 4 Russ. 478.

Clearly, this gave no right to a separate maintenance, so long as her brother was willing to allow her to reside with him, and she was not willing to do so. That being so, we have to look at what took place. The testator died on the 21st of August, 1852, and the first period extended to the death of the widow in October, 1855. There is no dispute that during this period the direction was substantially performed. Although *Thomas Bell* was not himself living at *Argam,* yet he lived near, and allowed his sister to reside at *Argam.*

We come now to a part of the evidence which is disputed. The Court cannot help looking with some suspicion at the evidence of the Plaintiff, who took no proceeding till 1868, after *Thomas Bell's* death. But I think that there is really no substantial difference in the evidence produced. The Plaintiff admits that it is true that "she never expressed a desire to reside with her brother." If, indeed, she had been prevented from living with him by his own misconduct or fraud, the Court would not have permitted him to take advantage of his own fraud. But she actually resided in his house, and was maintained by him till 1855, and then left of her own accord, and therefore it is incumbent on her to shew that she was afterwards willing to perform on her part the direction contained in her father's will. It is true that she denies that *Thomas Bell* was willing to receive her, and says that in consequence of his wife's temper it was impossible she should reside with him. But, on the other hand, we have the evidence of Mr. *Hodgson* that she threatened to take proceedings in 1857, and that in consequence *Thomas Bell* took the opinion of counsel. Taking the evidence on both sides, and having regard to the delay which has prevented the Court from having the evidence of her brother, who is dead, the result is, in my opinion, that after 1855 she was herself unwilling to comply with the direction of the will, and under these circumstances she was not entitled to impose a new burden on him; especially when we consider that the real estate was only given to him for life. I am of opinion that the obligation did not continue after his death; it was actually performed till she left *Argam;* she left it of her own accord, and put it out of his power to perform it any longer. There must therefore be a declaration that the Plaintiff *A. Bell* is not entitled to

L. JJ. 1869

WILSON v. BELL.

any charge on the testator's estate; and on payment of the legacy to the other Plaintiff all proceedings in the suit must be stayed.

SIR G. M. GIFFARD, L.J.:—

The question which we have to decide relates to the effect of the direction in the will of the testator, having regard to the facts which have happened. If this claim had been made by the Plaintiff in the lifetime of her brother, and her brother had refused her residence and maintenance, the Court would have had no difficulty in enforcing her rights. But her brother is now dead; she was maintained by him at *Argam* till her mother's death, and when she had left he was not bound to provide her a residence unless she desired it. But, even according to her own evidence, she did not desire it, and then in 1857 she made a claim for maintenance; the opinion of counsel was then taken, and *Wilson* was informed that the Plaintiff had no right to maintenance as distinct from residence, but that her brother was willing to receive her into his house.

With respect to the construction of the will, I think there can be very little doubt. There are certain charges, namely, the legacies charged on the estate, and then, which is very material, there is a devise of the real estate to *T. Bell* for his life only, and then follows the clause in question. I see no reason for separating the direction for maintenance from that for residence. It is all one entire direction; and it must be confined to the lifetime of *Thomas Bell*. The only ground on which such a construction could rest are the words, "so long as she is single and unmarried." But these do not make the two directions divisible. I think, therefore, that the obligation was confined to the life of *Thomas Bell*, and as he was ready to afford her a residence, but was never asked to allow her to reside with him, I can have no doubt that the Plaintiff has no ground for this claim. It is to be observed, too, that maintenance, as distinct from residence, was claimed and refused in 1857, but nothing was done in consequence of such refusal until the filing of the present bill. I therefore agree in the decree that is proposed. It will be in this form:—The Court being of opinion that the Plaintiff has no claim for maintenance, let the bill be dismissed so far as regards that claim, and on the legacy being

paid to the other Plaintiff let all proceedings in the cause be stayed.

Solicitor for the Plaintiff: Mr. *P. De Lande Long.*
Solicitors for the Defendant: Messrs. *Chilton, Burton, & Co.*

In re WILKINSON.

*Will—General Power—Legacies—*1 *Vict. c.* 26, *s.* 27.

Where a testatrix has a general power of appointment over sums of money, a bequest by her of pecuniary legacies *held* to operate as an execution of the power under 1 Vict. c. 26, s. 27.

Order of *Stuart*, V.C., affirmed.

BY an indenture of settlement, made in 1843, *Anne Wilkinson* assigned to trustees one-fourth part of the sum of £7000, or so much thereof as should be receivable, and also one-fourth of the sum of £2000, and also one-third of the sum of £4000, together with the stocks, funds, and securities in which the said sums might be invested, upon trust to call in and invest the same as therein mentioned, and to permit the said *Anne Wilkinson* to receive the annual income arising from such investment during her life; and after her decease to pay the same income, and to assign and transfer the said capital sums, and the securities upon which the same might then be invested, unto such person or persons, in such parts and proportions, and in such manner in all respects as the said *Anne Wilkinson* should, from time to time, by any deed or deeds, or by her last will, direct; and in default of such direction, then in trust for *George Wilkinson*, his executors, administrators, and assigns.

Anne Wilkinson, by her will, dated the 15th of November, 1848, bequeathed to *Susannah Wilkinson* the sum of £100, and gave and bequeathed to *Thomas Grueber* the sum of £500, and to *Thomas Grueber* and *Rosetta Pointing* the sum of £1000, upon trust to pay the same to *H. F. Wilkinson* in the event of his attaining the age of twenty-one years. And as to the residue of her property, the testatrix gave and bequeathed the same, subject to the pay-

L. JJ. 1869 *In re* WILKINSON.

ment of her just debts, funeral and testamentary expenses, to her sisters *Rosetta Pointing* and *Emma Wilkinson*. And the testatrix appointed *Thomas Grueber* and *Rosetta Pointing* executors of her will.

Anne Wilkinson, the testatrix, died in 1868.

The trustees of the indenture of settlement, had in the lifetime of *Anne Wilkinson*, transferred into Court the sum of £3051 consols, arising from the sums of money mentioned in the settlement, and a Petition was presented by *Rosetta Pointing*, and by the representatives of *Emma Wilkinson*, who was dead, praying payment of the £3051 consols, after deducting certain costs and expenses, to the Petitioners as residuary legatees under the will; they contending, in fact, that the will was a good execution of the power as regarded the residuary bequest, but not as regarded the legacies.

The Vice-Chancellor *Stuart* ordered payment of the legacies, holding the gift of the legacies to be an execution of the power under the 27th section of the *Wills Act* (1 Vict. c. 26), and the Petitioners appealed. (38 Beav 487)

Mr. *Dickinson*, Q.C. and Mr. *Millar*, for the Appellants:—

We say that the will operates as an appointment under the power so far as regards the residuary gift, but not so far as regards the gifts of legacies. In *Hurlstone* v. *Ashton* (1) the present Lord Chancellor, when Vice-Chancellor, said that if the bequest had been a mere gift of pecuniary legacies he should not have held it good. The Vice-Chancellor *Stuart* relied on *Wilday* v. *Barnett* (2), but there the Master of the Rolls did not think it necessary to consider the general principle. *Shelford* v. *Acland* (3), and *Lowe* v. *Pennington* (4), are all against the validity of such legacies. The meaning of the section is plain, that where a testator has a general power of appointment over property, the property shall pass by a general devise, or by any part of the will which refers specifically to any part of the property. If a testatrix had power to appoint certain jewels no doubt they would pass by a bequest of all her jewels as being specifically referred to; but a general pecuniary legacy without any reference to the power is not within the Act. We admit that

(1) 11 Jur. (N.S.), 725.
(2) Law Rep. 6 Eq. 193.
(3) 23 Beav. 10; 3 Jur. (N.S.) 8.
(4) 10 L. J. (Ch.) 83.

we cannot distinguish this case from *Hawthorn* v. *Shedden* (1), but that was decided by the same Judge, and we may be considered as appealing against that decision also. The present Lord Chancellor had that case, and also the observations of Lord *St. Leonards* in his treatise on Powers (2), before him when he decided *Hurlstone* v. *Ashton* (3). If the testatrix had expressly made the residue subject to the payment of legacies it might be different, but so far from doing so, she has expressly made it liable to debts, thereby virtually excluding legacies. There must be either a gift of the whole or a reference to the particular part. She may be considered to have given the legacies out of her own property, and then to have given to the residuary legatees what she had power to appoint, after payment thereout of her debts.

Mr. *Greene*, Q.C., and Mr. *Cookson*, for the legatees, were not called upon.

SIR C. J. SELWYN, L.J., after reading the material passages in the deed and in the will, continued:—

Now, in the first place, these gifts of pecuniary legacies are in the most general words, and it would be difficult to conceive any more general description. Then immediately after the gifts of the legacies comes the gift of the residue, and we find that the words of 1 Vict. c. 26, s. 27, will apply to these two gifts. The words are:—"A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will."

In this case, the testatrix certainly had power to appoint in any manner she might think proper, and she has made a gift of personal property described in a general manner—as general as possible. It therefore comes completely within the words of this section, and also within its spirit. The enactment was intended to

(1) 3 Sm. & Giff. 293; 2 Jur. (N.S.) 749. (2) Ed. 1861, p. 310.
(3) 11 Jur. (N.S.) 725.

L. JJ. 1869 In re WILKINSON.

get rid of the difference between property and power, and to make it unnecessary in framing a will to refer to the instrument creating the power or to the actual subject of the power. It was admitted in argument, and could not, in fact, be denied after the decision in *Wilday* v. *Barnett* (1), that if the testatrix had given the whole of her personal estate, that would have been a good execution of the power; and it is difficult to draw any distinction between a gift of the whole and a gift of legacies, which is merely dividing the gift into three or four portions instead of giving it in one.

It appears to me that the present case is stronger than *Hawthorn* v. *Shedden* (2), but if it were necessary to give an opinion upon that case, I should hold that it was rightly decided. This case is, in my opinion, more favourable to the legatees than *Wilday* v. *Barnett*, and is within the words of the Act.

SIR G. M. GIFFARD, L.J.:—

This is a very plain case and is concluded by *Wilday* v. *Barnett*. I cannot see how any doubt can be entertained upon the subject, for the disposition of the personal estate is as complete as can be conceived. There is a gift of pecuniary legacies, and a gift of residue, which must mean what is left after payment of legacies, and therefore the case appears completely governed by *Wilday* v. *Barnett*, and within the words of the Act. If doubts have been expressed as to the case of *Hawthorn* v. *Shedden*, I ought to say that I do not feel any doubt that it was correctly decided. If there is a gift of £100, I do not see why that should not be held to be part of the personal estate of which the testator had power to dispose.

Appeal dismissed with costs.

Solicitors: Messrs. *Pritchard & Englefield*; Messrs. *Grueber & Cooper*.

(1) Law Rep. 6 Eq. 193. (2) 3 Sm. & Giff. 293; 2 Jur. (N.S.) 749.

In re LUSH'S TRUSTS.

L. JJ.
1869
June 25, 26.

Married Woman—Fraud—Coercion by Husband.

A woman, two months after her marriage, wrote and signed in her maiden name a paper dated before the marriage, and purporting to give to her husband, in consideration of the marriage, her reversionary interest in a trust fund. She signed this paper for the purpose of enabling him to borrow money on her reversionary interest; he threatening that if she did not sign it he would send her back to her relations, with whom she was on bad terms. The husband sold the reversionary interest, and shortly before completion, he being at the time in prison for debt, she signed and gave to the purchaser's solicitor a letter addressed to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the trust fund to her husband. Upon the determination of the life interest she claimed her equity to a settlement, on the ground that the paper being signed after marriage did not bind her. *Held*, by the Master of the Rolls, that though she had been a party to a fraud, yet as she had acted under the coercion of her husband, she was not responsible for it, and was entitled to her equity to a settlement:—

Held, on appeal, that she had been guilty of a fraud, which prevented her claiming her equity to a settlement against the purchaser.

THIS was an appeal from a decision of the Master of the Rolls.

The Respondent, Mrs. *Bowren*, formerly *Ellen Louisa Buckland*, was at the time of her marriage entitled in reversion expectant on the decease of her mother to one-sixth share of £5640 New £3 per Cent. Annuities and of £1540 Consols, under the will of *Charles Lush*, who died in 1841. She attained the age of twenty-one years in 1853, and intermarried with *Edward Bowren* on the 3rd of February, 1858.

The following document, dated the 1st of February, 1858, was written and signed by Mrs. *Bowren*:—

"I, *Ellen Louisa Buckland*, being about to marry *Edward Bowren* (and upon his marrying me), I (in consideration of such marriage) give up to him the said *Edward Bowren*, for his own sole use and benefit, the whole of my interest under the will of *Charles Lush*, Esq., and in case of such marriage I hereby request and direct the trustees of the said will to pay over to the said *E. Bowren* (in case of such marriage) the whole of such interest of me the said *E. L. Buckland* under such will, and I, *E. L. Buckland*, have

L. JJ. 1869 — *In re* LUSH'S TRUSTS.

assigned my interest under the said will to the said *E. Bowren* before my marriage."

By an agreement in writing, dated the 20th of May, 1858, *Bowren* agreed to sell to *John Collins* the above-mentioned sixth share, and on the 7th of July, 1858, he filed his bill against *Collins* and Mrs. *Bowren*, stating that *Collins* refused to perform his contract, and alleged that the Plaintiff could not make a good title to the reversionary sixth share on the ground of its being the reversionary interest of a married woman in a money fund, and praying that it might be declared that the Plaintiff was absolutely entitled to the reversionary share under the memorandum of the 1st of February, 1858, and that *Collins* might be decreed specifically to perform the agreement. *Collins*, on the 14th of July, put in an answer without oath or signature, admitting the allegations in the bill, but Mrs. *Bowren* did not answer. On the 17th of July the cause was heard as a short cause without any evidence, and a decree was made, simply declaring the absolute right of the Plaintiff to the premises, without any directions for specific performance, or as to costs.

On the 20th of August, 1858, Mrs. *Bowren's* reversionary share in the fund was sold by auction to the *Law Reversionary Interest Society* for £400. The purchase was completed on the 14th of October, 1858, and previous to completion *Bowren*, on the 9th of October, being then in *Whitecross Street Prison*, wrote a letter to Mr. *James Bowen May*, who had been his solicitor in the suit, authorizing him to receive the purchase-money, and directing him to make certain payments out of it, and pay the residue to Mrs. *Bowren*, which it appeared was done.

Shortly after completion, the solicitors of the *Law Reversionary Interest Society* sent to the acting trustee of Mr. *Lush's* will a letter addressed to him, dated the 11th of October, 1858, signed by Mrs. *Bowren*, but the body of which was not written by her, which was as follows:—

"Dear Sir,—I beg to inform you that previous to my marriage with *Edward Bowren*, on the 3rd day of February last, I assigned to the said *E. Bowren* all my interest under the will of *Charles Lush*, Esq."

In 1867, the tenant for life under Mr. *Lush's* will died, and the

trustees paid Mrs. *Bowren's* share of the trust funds into Court under the *Trustee Relief Act*, in consequence of Mrs. *Bowren*'s setting up the case that the document dated the 1st of February, 1858, was not signed till April, 1858, some time after her marriage.

The *Reversionary Interest Society* then presented their petition for payment of the fund to them. Mrs. *Bowren* filed an affidavit in opposition, stating that she had not before her marriage signed any paper whatever relating to her property. She further deposed as follows:—"About two months after my marriage, that is to say on or about the 3rd of April, 1858, the said *E. Bowren* told me that if I signed a paper which he had in his possession he would borrow a sum of money on my reversionary property. We were then in great distress for want of money. He assured me that by signing such paper I was not parting with my property, or in any way injuring myself, and that such paper was wanted merely for the purpose of borrowing money. He forced me to sign such paper, and said that if I did not he would leave me and I should have to return home. I at first objected to sign the paper, as he wished it dated previous to my marriage, and to be signed in my maiden name, but he forced me to sign it. At length, when I could resist no longer, I yielded to his persuasion and signed some paper writing the terms of which he then dictated to me." In another affidavit she said, "I was in such terror and fear at my husband's threat of sending me back home (as I was not on good terms with my family owing to my marriage with him) that I wrote what he told me without daring to oppose his wishes." She went on to say, that she never knew of the Chancery proceedings while they were pending, and that they were got up by *Bowren* and *Collins* (who had formerly been a clerk of Mr. *Bowen May*), for the purpose of depriving her of her reversionary interest, the sale to *Collins* being fictitious. She further stated that *Bowren* deserted her in 1859, and that she had not heard of him since October, 1861. On cross-examination she admitted that she signed the document of the 1st of February, 1858, for the purpose of enabling her husband to borrow money on her reversionary property. She denied having signed the letter of the 11th of October, 1858, but the Court considered her signature sufficiently proved.

L. JJ.
1869
In re
LUSH'S
TRUSTS.

In March, 1858, *Collins* had written several letters to the trustees, on behalf of Mr. and Mrs. *Bowren*, about raising money on Mrs. *Bowren's* reversionary interest, in which he always spoke of it as hers, and on one occasion suggested that she could mortgage under *Sir R. Malins' Act*, and he never in any way alluded to any antenuptial instrument under which Mr. *Bowren* was entitled.

The Master of the Rolls considered it to be established that the paper dated the 1st of February, 1858, was written after the marriage, and thought that it was written under such pressure from the husband that Mrs. *Bowren* could not be made responsible for it as a fraud. His Lordship, therefore, after directions for payment of costs, directed the income of the fund to be paid to Mrs. *Bowren* for her separate use until further order (1). The *Law Reversionary Interest Society* appealed.

(1) LORD ROMILLY, M.R., after stating the facts, and observing on the suspicious character of the memorandum dated the 1st of February, 1858, which his Lordship was satisfied had been signed after the marriage, and on the manifestly collusive character of the proceedings in the suit, continued :—

Then the *Reversionary Interest Society* purchase the property. I am bound to say that they are clear of all complicity with anything wrong in the matter, but it must be observed that they make no inquiry at all; they are satisfied with the decree of the Court of Chancery; and they do not require any distinct evidence of this document, though it appeared on the face of the decree that it had not been proved in the cause. It has been asked, what more could they have done than they did? I reply, a great deal more could have been done. They might have required Mrs. *Bowren* to go before a magistrate, and make a declaration respecting the document, or, at all events, they might have made some inquiry of her about it; and it appears to me impossible to acquit them of great negligence.

In this state of the case the matter comes before me, and it raises an important question on the subject of fraud. No doubt a married woman, as well as an infant, may be guilty of fraud, as was decided in the case of *Vaughan* v. *Vanderstegen* (2 Drew. 363). But it must always be remembered that the Court of Chancery considers, according to the law of *England*, that the husband has a paramount influence over the wife. In the case of *Vaughan* v. *Vanderstegen* the lady was living alone, and fraudulently represented herself to be a *feme sole* to the person who advanced her money, her husband having nothing to do with it. That is quite different from the case of a married woman joining with her husband in a fraud. So also in the case of *Derbishire* v. *Home* (3 D. M. & G. 80) the married woman made false representations to the trustees, and having thus induced them to commit a breach of trust, she turned round upon them, and endeavoured to make them answerable for that breach of trust. That is very different from the present case, where Mrs. *Bowren* made no representation to the actual purchaser, but wrote a document, at the instance of her husband, which was to

Mr. *Jessel*, Q.C., and Mr. *Bristowe*, Q.C., for the Appellants:—

If the document of the 1st of February, 1858, was signed when it bears date, our case is clear, and the Court will not decide that it was not on the unsupported testimony of an interested person who signed it. But if it was signed after the marriage as she states, then her signing it was a fraud for which, though a married woman, she is liable, and full effect must be given to the instrument as against her. *Derbishire* v. *Home* (1); *Vaughan* v. *Vanderstegen* (2); *Clive* v. *Carew* (3); *Barrow* v. *Barrow* (4); *Savage* v. *Foster* (5).

---

be made use of for the purpose of deceiving the Court and cheating the purchaser. Here we have a husband who wishes to borrow money, and says to his wife: "Copy that document for me, and sign it. It is true I intend to raise money upon it, but I insist upon your copying that document for me, and signing it." What species of defence has she against her husband in a case of that description unless it is the defence which the law gives her by compelling all persons who take advantage of such a transaction to look into it with the most careful scrupulosity? What distinction is there between this species of fraud and that species of fraud which a married woman, I am sorry to say, constantly commits at the instance of her husband, when, after her marriage, she assigns her reversionary interest to a purchaser, and gets money upon it, promising never to dispute that contract afterwards, yet the Court does not consider her bound? The present case is not the same as if Mrs. *Bowren* had been living alone as a *feme sole*, and from her own motion had made that representation; she was under the influence of her husband, and had not the moral power to resist an influence which the law recognises, and her yielding to which the Court is bound to excuse. It is on account of that influence that the Court requires the separate examination of a married woman in order to be sure that she is away from the control of the husband. I remember taking the examination of one married woman who had joined with her husband in assigning the fund to a third person, and she said to me: "It is very hard upon me, but I did it, and I do not depart from my promise." I told her she was not bound by that promise, but she insisted upon it. That is a rare case. She told me at the time that she could not resist her husband, and he compelled her to do it. Now, I do not see the distinction between a married woman's copying a document set before her by her husband and joining with him in executing a deed in favour of another person. I am therefore of opinion that she is not bound by that statement, and that she, in point of fact, has been one of the victims of the plot that was laid for the purpose of obtaining a decree from the Court of Chancery with a view to raising money upon her reversionary interest. I think that this is a case where the equity to a settlement extends to the whole fund; but as nothing is known about the husband, I shall do nothing more at present than order the dividends to be paid to Mrs. *Bowren*.

(1) 3 D. M. & G. 80.
(2) 2 Drew. 363.
(3) 1 J. & H. 199.
(4) 4 K. & J. 409
(5) 9 Mod. 35.

L. JJ. 1869 *In re* LUSH'S TRUSTS.

Sir *R. Baggallay*, Q.C., and Mr. *E. Cutler* for Mrs. *Bowren*:—

There is sufficient corroborative evidence to satisfy the Court that the paper dated the 1st of February, 1858, was not signed until after marriage. It therefore is not binding. It was signed under such circumstances that Mrs. *Bowren* was not a free agent; fraud, therefore, cannot be imputed to her, and the Appellants cannot be in any better position than the husband. The Chancery proceedings are suspicious on the face of them, and the Appellants were guilty of gross negligence. It is clear on the evidence that Mrs. *Bowren* signed the letter of the 11th of October, 1858, without knowing what it was about. She is therefore entitled to her equity to a settlement, or, if the husband be dead, to the whole fund by survivorship.

SIR C. J. SELWYN, L.J.:—

Although I cannot agree in the conclusion at which his Lordship, the Master of the Rolls, has arrived in this case, I do not think there is any difference of opinion between that learned Judge and this Court with respect to the law applicable to cases of this description, for his Lordship refers with approbation to the decision of the Vice-Chancellor *Kindersley* in *Vaughan* v. *Vanderstegen* (1), where the Vice-Chancellor, after stating in a very few words a proposition of which, I apprehend, at the present time, no doubt can be entertained; viz., that it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of such fraud, refers to the case of *Savage* v. *Foster* (2), a case where the husband and wife concurred in a fraud which was not such an active fraud as that which we find in the present case. [His Lordship also referred to the case of *Derbishire* v. *Home* (3), where Lord Justice *Turner*, says: "There is, I think, strong ground to contend that as a Court of Equity creates and models the separate estate, the estate so created and modelled must be subject to the ordinary rules of the Court."] Now, there is no doubt that in cases of separate estate, and especially in cases where that separate estate is coupled with the restraint upon

(1) 2 Drew. 363. (2) 9 Mod. 35.
(3) 3 D. M. & G. 80, 113.

anticipation, many questions may arise as to how far the Court can, in dealing with cases of fraud on the part of married women, overrule a declaration of the settlor or of the testator in respect to the separate estate and the restraint upon anticipation, and some cases have gone so far as to say that although it was very greatly for the benefit of the married woman that that restraint should be removed, still if the settlor or testator has imposed it, the Court has no power to take it away, even for the benefit of the married woman. But in the present case we are relieved from any consideration of this kind, because this lady was absolutely entitled in her own right to this reversionary interest, and upon her marriage it would pass to the husband, subject only to her right to it in the event of her surviving him, and to her equity to a settlement. Now the equity to a settlement is certainly an interest which this Court will control, and will not, as we had occasion to say in the very recent case of *Barnard* v. *Ford* (1), allow it to be made an engine of fraud, or, according to my learned brother's expression, allow it to be enforced where it would be contrary to good conscience to do so. The question we have now to consider is, whether, under the circumstances proved in this case, it would be contrary to good conscience to allow this lady to assert an equity to a settlement.

With respect to the facts: in the first place we have a document which is entirely in her own handwriting, which bears date the 1st of February, 1858, two days before her marriage. It is a document certainly open to the observations which have been pressed upon us with great force by Sir *Richard Baggallay* as being of a very unusual character, but at the same time it is one which called most pointedly to Mrs. *Bowren's* attention the fact that it was most material for it to appear that it had been written before her marriage. She says, however, that in point of fact it was not written until the month of April, that she wrote it under the influence of her husband, and under the pressure of a threat that unless she signed it he would send her home. She says she wrote it very reluctantly, and only in consequence of the exercise of that influence and under the pressure of that threat.

Then the first question is, whether we are to take it as established that the document was, in fact, not written until after the

(1) Law Rep. 4 Ch. 247.

L. JJ. 1869 *In re* LUSH'S TRUSTS.

marriage; because I think that supposing it to have been written before the marriage, it clearly would be sufficient to exclude any equity to a settlement. I cannot help agreeing in the conclusion at which his Lordship the Master of the Rolls arrived as to the time when the document was written. It is no doubt very dangerous to trust to the testimony of a person who comes to say that a document written by herself, and signed by herself in her maiden name, and dated before her marriage, was actually written by her when that was no longer her name, and when she had been married several months; but I think that there are here corroborative circumstances sufficient to lead to the conclusion that her representation is correct, and I especially refer to the suit. I entirely agree with the observations which his Lordship the Master of the Rolls has made upon that suit as being a means of making the Court an instrument of fraud. The bill is filed on the 7th of July, the answer is put in on the 14th, the decree is obtained on the 17th, and upon the face of that decree it appears that the only essential thing in such a suit, viz., the evidence, was omitted altogether. That being so, I am of opinion that it is sufficiently established that this document of the 1st of February, 1858, was not written until after the marriage of the lady. But the whole of the document being in her handwriting, her attention must have been most pointedly called to the transaction, and her own statements clearly shew that her husband was in great difficulties, and that she was aware that this document was written for the purpose of enabling him to raise money upon her property.

After the suit, which I have already mentioned, we come to the sale by auction in October, and I cannot help expressing my very strong belief that, so far as the Appellants were concerned, the purchase was a *bonâ fide* purchase by auction, made by them under ordinary circumstances, and at a fair and reasonable price. Then they proceeded to investigate the title, and although I agree that the document has certain marks of singularity upon it, and although the suit was one of a most singular character, and one which if the suspicion of the purchasers had been aroused would have been calculated to increase that suspicion, still I do not think that the circumstances were of such a character as to induce the Court to say that the purchasers must have known—and I believe they did

not know—that any fraud or deception had been perpetrated. I think that the transaction is very fairly represented in the letter produced this morning, the letter which was written on the 12th of October, 1858, from Mr. *Dalton*, writing in the name of his firm to one of the trustees, in which he says, "As we thought it would probably be satisfactory to the trustees to have a letter from Mrs. *Bowren* stating the fact of her having made over her interest under Mr. *Lush's* will prior to her marriage, we required the vendor's solicitors to obtain one, and we now enclose it. Perhaps you will be kind enough to put it away with the papers you have relating to the trust. We have not completed the purchase, but expect to do so in the course of the week, when we will send you the usual formal notice." I think that letter correctly represents what really took place, and it is to my mind quite conclusive that the purchasers were acting *bonâ fide*, and that they required this letter for the purpose of preventing any possibility of doubt on the part of the trustees.

Of course, in all these transactions we must ascertain whether the lady was a free agent, because although a married lady may, as I have already said, be guilty of a fraud, and consequently be visited with the consequences of that fraud, on the other hand she is entitled to have the same protection as any other person, and to say that she is not liable for acts which were not done of her own free will, but in respect to which she was acting under such coercion as prevented her from being a free agent. Now, in the first place, even assuming that she was acting under some species of coercion in this transaction, still the very fact which she states as to the pressure which was then exercised upon her, must have left an impression upon her mind which would render her exceedingly sensitive with respect to all subsequent transactions relating to the same matter. And then when we find by her own admission that she was aware that money was about to be raised upon the security of this reversionary interest, when she knew that she had written and signed a document which she says herself she wrote and signed with very great reluctance, knowing that it did not express the truth, knowing that it was signed by her in a name which was no longer hers, and that it bore a date which was not the true date —under these circumstances an application was made to her to

L. JJ. 1869 *In re* Lush's Trusts.

write the letter of the 11th of October, 1858. It is true that the body of that letter is not, like the body of the former letter, altogether in her own handwriting, but although she originally denied her signature, it is now clearly proved, and, in fact, is admitted at the Bar on her behalf, that that letter was signed by her. At this time she was under no coercion, under no pressure, her husband was in prison, and she was living separate and apart from him, and the question of fact which we have to try, and this is, in truth, the question upon which my opinion differs from that of his Lordship the Master of the Rolls, is whether she was a free agent when she wrote that letter. I say, having regard to the circumstances stated by herself, and to the pointed manner in which her attention must have been directed so recently as April in the same year to this transaction, having regard to the fact that she admits that she knew that money was about to be raised upon the security of this reversionary interest, and to the fact that she also admits that she actually herself received some portion of the money which was raised by means of this transaction, I say it is impossible to believe that she could have signed so short a document as that of the 11th of October, 1858, without being fully cognizant of its contents, meaning, and object. I say, then, that the parties who were about to advance the money, and who did advance it three days afterwards, were entitled to believe the representations made by her in that letter, and I think she cannot now be heard to say that they ought to have disbelieved those representations. I think it would be contrary to equity and good conscience to allow a lady who had made under such circumstances a declaration so clear and distinct as that, to set up afterwards a claim to an equity to a settlement so as to defeat the interests of the purchasers who, upon the faith of that representation, have paid the purchase-money in respect of her interest.

Consequently, I think that the order made by his Lordship the Master of the Rolls must be reversed, and that there should be an order directing the remainder of the fund, after payment of the costs of the trustees, to be paid to the Appellants.

Sir G. M. Giffard, L.J.:—

The propositions of law which are applicable to this case are to my mind very simple, viz., that a married woman may by fraud

preclude herself from her equity to a settlement, and (although I do not think it necessary for the decision of this case) that she may also preclude herself by fraud from any right to a reversionary interest falling into possession after the death of her husband.

Then the first question is, whether in this case there has been fraud in the statements made by this married lady. Taking all the circumstances into consideration I have no doubt that the document which she represents to have been signed on some day after the marriage in February, 1858, was in truth signed after the marriage. What she says is, that her husband threatened to leave her if she did not sign it, and she says, in her cross-examination, "I think I must have known that he was trying to borrow money upon my property. My husband told me that if I would sign Exhibit 1, he could borrow money upon my property, and I signed it with the intention of enabling him to do so." The whole of that document is written in her hand, it is written in a very plain hand, and in a very firm hand, and I can have no hesitation in saying that a married woman who signs a document of that description under those circumstances, if she turns round afterwards and comes to this Court to make a claim as against that document, must be treated as having committed a fraud. In this case there is no evidence of any such pressure or influence as would do away with the effect of that act which she did; moreover, there is a very wide difference indeed between holding a married woman not bound by a contract and holding her not bound by false representations and fraud.

Then, that being so, the next question is, whether the purchasers were cognizant of the fraud. It is quite plain that they were not. This was a sale by auction; they bought her reversionary interest at the auction in the usual way, and paid a fair consideration for it, and, indeed, that they were cognizant of the fraud has never been suggested.

Then there is this further question, whether there was any such negligence on the part of the purchasers as would visit them with the same consequences as if they had been cognizant of the fraud. I think there was no negligence; the document dated on the 1st of February, 1858, was no improbable document for a

L. JJ. 1869 *In re* LUSH'S TRUSTS.

lady to have executed on the eve of her marriage. It is neither more nor less than this, that being entitled to a certain sum of money expectant on the death of her grandfather, she gives it up to her husband. There would be nothing very extraordinary in that, nor anything very extraordinary in its being done by a document of this description. Then, as to the decree: to that decree all necessary persons are parties. It is true that the decree does not recite that there was any evidence, but it cannot, in my opinion, be held that because the decree did not refer to any evidence, therefore the purchasers were bound to inquire whether the proceedings were *bonâ fide*. When such a document and decree as these are presented to a purchaser, I cannot hold him liable for negligence because he makes no further inquiry. But the matter does not stop there. Beyond all question this lady knew perfectly well when her husband was in prison that Mr. *Bowen May* was raising money upon the footing of the document which she had signed in the month of April. In the course of that transaction, because the trustees had said that they had had no notice of any assignment of this interest to the husband, the society, without any suspicion (as I think) being aroused on their part, request the solicitor of the vendor to obtain from Mrs. *Bowren* a letter stating that she had executed this document antecedently to her marriage. She signs that letter, and, although she has forgotten it, I have no hesitation in imputing to her, and in saying that every Court must impute to her, a knowledge of its contents, and it would be monstrous if, after signing it with such knowledge, she could be heard to assert any right inconsistent with it.

For these reasons, I am clearly of opinion that it would be most unjust that this lady should be allowed to come forward and to assert in this Court, contrary to all good conscience, any right of any kind or description to this fund. I cannot help saying that I think she ought not to have made this claim, and that it was not honest for her to do so. I quite agree that she is very much to be pitied, because she has contracted a most imprudent marriage, and because she has been deserted by her husband, and because, in all probability, she acted to some extent under the influence of her husband; but that is no reason why a married lady who chooses to commit a fraud should afterwards come forward and say, "I

am still entitled to this property, though other persons have been induced to purchase it by my making a representation which I knew at the time I made it to be utterly and wholly untrue."

For these reasons I am of opinion that the order below must be discharged, except so far as it orders payment of the costs of the trustees, and that the surplus after payment of those costs, must be paid to the society.

Solicitors: Messrs. *Capron, Dalton, & Hitchins;* Messrs. *Cutler & Turner.*

STEWARD *v.* BLAKEWAY.

Co-ownership of Real Estate—Investment of Profits in Land—Partnership—Real or Personal Estate.

Co-owners of lands, partly customary freehold and partly leasehold, worked a quarry on part of them, and let the rest to agricultural tenants. Part of the undivided profits were from time to time laid out in purchases of other lands for purposes of the quarry, the lands so purchased being, in most cases, conveyed to trustees on trust for the persons expressly by name who were interested in the undivided profits constituting the purchase-moneys, their heirs and assigns, and being in other cases conveyed to trustees without any express declaration of trust. One of the co-owners (a woman) married, and on her marriage a settlement of her shares and interest in the lands and quarry, plant and machinery, was executed, by which her shares and interest in the customary freeholds were treated as real estate, and her shares and interest in the entire property, both real and personal, were settled on herself for life for her separate use without power of anticipation, with remainder to her husband for life, with remainder, in default of issue, in trust for her, her heirs, executors, administrators, and assigns. Further purchases of customary freehold land were, after her marriage, made from time to time out of the undivided profits of the quarry, the land so purchased being conveyed to trustees, but without any trusts being declared, except in one instance, that of a purchase made in 1849, in which case trusts were expressed on the instrument of conveyance, and were for the benefit of the co-owners, by name, in undivided shares, their heirs and assigns. In the books of account kept by the manager of the business these purchases were treated as if they had been purchases of stock in trade. These accounts were from time to time submitted to the parties interested, and, in particular, to the husband of the married woman. She having died without issue:—

Held (affirming the decision of the Master of the Rolls), that her share in the purchases of land so made after her marriage devolved as real estate, and

L. JJ.
1869
STEWARD
v.
BLAKEWAY.

not as personalty, and having been made with savings of income, were not comprised in the settlement, but passed at once on her death to the Plaintiff, her heir-at-law and customary heir.

THIS was an appeal from a decision of the Master of the Rolls (1). The decision of the Court of Appeal was based upon somewhat different grounds from those upon which the Master of the Rolls relied, and it is therefore necessary to state some facts which do not appear in the former report.

The question in the suit was, whether a share of certain lands of copyhold or customary freehold tenure, which had been purchased out of the profits of quarries worked by or on behalf of co-owners of lands, some of which contained the quarries in question, passed on the death of Mrs. *Blakeway*, one of the co-owners, to the Plaintiff as her heir-at-law and customary heir, or to her husband as her personal representative. On the part of the husband it was alleged that there had been a partnership in the business of the quarries, and that the real estate in question formed part of the partnership assets, and, consequently, was to be treated as personal and not as real estate. The Master of the Rolls made a decree in favour of the Plaintiff, and Mr. *Blakeway* appealed.

Prior to 1791 *Gabriel Steward* and *Francis Steward* carried on a trade in stone, and they were entitled as tenants in common to certain real estate in the *Isle of Portland*, on parts of which quarries were worked. *Gabriel Steward*, by his will, dated the 12th of December, 1791, devised all his real estate in trust for his children, their heirs and assigns, as tenants in common. He died in 1792, leaving seven children. *Francis Steward* died in 1798, having by his will, dated the 14th of November, 1797, devised all his real estate to his wife, *Martha Steward*. By an indenture dated the 10th of July, 1799, all the parties then interested in the estates of *Gabriel* and *Francis Steward* covenanted (among other things) to vest, and in pursuance of their covenant they, by an indenture dated the 12th day of October, 1799, vested, their real estate in trustees on trust for sale, and, after payment of certain debts, to divide the surplus proceeds amongst the parties interested according to their respective shares. No sale took place under the trusts of these deeds, but the children of *Gabriel Steward*, and those who

(1) Law Rep. 6 Eq. 479.

claimed through and under them, continued in possession of the real estate in the *Isle of Portland*, and worked the quarries on behalf of themselves and the owners of *Francis Steward's* interest. The business was carried on under the name of *Steward & Co.*, but no articles of partnership were ever entered into. Purchases of further pieces of land were from time to time made out of the profits of the quarries, and these purchased lands were conveyed to trustees, in about ten instances without any trusts declared, but in fourteen cases trusts were in the instruments of conveyance expressed for the persons interested, their heirs and assigns, according to their respective shares and interests.

In various ways the parties from time to time dealt with their shares in the property in a manner inconsistent with the notion that it had been converted into personalty under the deeds of the 10th of July, 1799, and the 12th of October, 1799.

In 1845 *Georgiana Steward*, one of the persons interested in the land and in the business of the quarries, intermarried with *Roger Charles Blakeway*, one of the Defendants to this suit. Prior to their marriage a settlement, dated the 27th of October, 1845, was executed, and thereby all that one-third of two shares, of one-seventh each, of and in all the messuages, lands, quarries, and hereditaments, or shares of messuages, lands, quarries, and hereditaments, horses, machinery, property, and effects in the *Isle of Portland*, of or to which *Georgiana Steward* was possessed or entitled for any term or terms of lives and years, or other leasehold estate or interests, and all the messuages, lands, hereditaments, and premises, or parts or shares of lands, hereditaments, and premises, of or to which *Georgiana Steward* was seised in fee or otherwise entitled in the *Isle of Portland*, were conveyed and assigned to trustees, their heirs, executors, administrators, and assigns, in trust for her for life for her separate use without power of anticipation, with remainder for Mr. *Blakeway* for life, with remainder as Mrs. *Blakeway* should by deed or will appoint, and, subject thereto, on trust after the death of Mr. and Mrs. *Blakeway* for sale and division of the proceeds among the children of the marriage; and it was provided that if there should be no child who attained a vested interest, the trustees should stand possessed of so much of the hereditaments and premises as should not have been sold, and of the

L. JJ. 1869 STEWARD v. BLAKEWAY.

moneys arising from any sales which might have been effected, in trust for Mrs. *Blakeway*, her heirs, executors, administrators, and assigns.

Mrs. *Blakeway* died in March, 1862, without leaving any issue. Her husband survived her. The Plaintiff in this suit was her brother, and heir-at-law and customary heir. After her marriage the business of the quarries was carried on as before, and further purchases of land were made out of the undivided profits. In the books of account kept by the manager of the business the land so purchased was treated in exactly the same way as the purchases made of cranes and other implements and stock connected with the business. The land so purchased was conveyed to a trustee or trustees, and in one instance a piece of land purchased in 1849 was, by an indenture dated the 18th of October, 1849, conveyed to *John Foot* in fee, as to two equal undivided seventh parts thereof, in trust for *John Steward*, *Maria Gwynne*, and *Georgiana Blakeway*, their heirs and assigns, as tenants in common. In all other instances the purchases made after Mrs. *Blakeway's* marriage were taken to trustees, but without any trusts declared.

The moneys laid out in this way in the purchase of land were entered in the accounts, which were at regular intervals submitted by the manager of the business to the different persons interested therein, and in this way the purchases were known to both Mrs. *Blakeway* and her husband.

The land claimed by the Plaintiff in this suit was Mrs. *Blakeway's* share of the purchases which had been made after her marriage, it being alleged that she had been entitled to the profits of the business which constituted the purchase-moneys of the purchased lands in the proportion of 19-210ths, that fraction representing her share of the business, and the lands and quarries held in connection therewith.

Sir *R. Baggallay*, Q.C., and Mr. *Renshaw*, for the Appellant:—

It is clear that there was a partnership in the business of the quarry, and the purchases of land made after Mrs. *Blakeway's* marriage were made out of partnership assets. The land so purchased was therefore partnership property, and must be treated as

personal estate: *Darby* v. *Darby* (1). Even if Mrs. *Blakeway* must be taken to have given her assent to the purchases, still, if they were made for partnership purposes the land purchased would, in the absence of any contract, devolve as personalty not as realty. [They cited also *Crawshay* v. *Maule* (2); *Bank of England Case* (3); *Houghton* v. *Houghton* (4); *Wild* v. *Milne* (5).]

Mr. *Jessel*, Q.C., and Mr. *Holmes*, for the Plaintiff:—

There never was a partnership, for there was never any contract of partnership. There was only a co-ownership of these lands, which the co-owners agreed to use in a particular way. If a partner sells his interest to a stranger that puts an end to the partnership; so that if there ever was a partnership in this case, the settlement made on Mrs. *Blakeway's* marriage put an end to it. Part owners may be liable to third parties as partners, without being partners *inter se*, and in such a case one part owner could not file a bill against the others to enforce a sale of the whole of the joint property. In *Crawshay* v. *Maule* (6) there was a manufacture of iron, which was a trade; in the present case the stone was merely quarried rough-hewn, and then sold. The conduct of a married woman cannot afford any inference of a contract that there should be a joint ownership even in the proceeds of the quarry, for she was incapable of contracting. It is clear that the purchases of land made after Mrs. *Blakeway's* marriage were, so far as she was concerned, made out of the savings of her separate income, with her assent, and that being so, her husband has no equity to the land so purchased.

Mr. *Brodrick*, for trustees.

Mr. *Renshaw*, in reply.

SIR C. J. SELWYN, L.J.:—

The first question raised before us is not mentioned in the report of the hearing in the Court below; I mean the question as to the effect of the settlement of July, 1799. It has been argued that

(1) 3 Drew. 495. 2 Jur. N.S. 271
(2) 1 Sw. 495, 518.
(3) 3 D. F. & J. 645.
(4) 11 Sim. 491.
(5) 26 Beav. 504.
(6) 1 Sw. 495.

L. JJ. 1869 STEWARD v. BLAKEWAY.

this deed amounted to a conversion into money of the land comprised in it. This, however, is not the case made by the answer, nor is it the point which has been mainly argued. It is sufficient to say that that deed appears to have been never acted upon, and the parties have dealt with the property comprised in it as if that deed had never existed. Whether it has been revoked or not the trusts of it are not now capable of being enforced. It must be taken, therefore, that at the date of the settlement of 1845 the parties were interested in the lands in undivided shares as co-owners. It appears by the admissions in this cause, that before the date of the marriage of Mrs. *Blakeway* there were as many as fourteen deeds of conveyance of pieces of land which were purchased out of the profits of the business of the quarry, which conveyances were made to trustees upon trust for the persons interested in the original lands, their heirs and assigns, according to their respective shares and interests. It must be taken that Mrs. *Blakeway* had a general knowledge of what was done, and that she assented to it. Taking it, then, that the land before her marriage was not subject to any trust for conversion, and looking at the fourteen deeds to which I have referred, by which the property was dealt with as real estate, a course of dealing with the property as real estate is established, and there is no evidence of any change in this manner of dealing with it after the settlement of 1845. It must be taken, therefore, that the purchases of land made subsequently to that date were made for the same purposes as the previous ones, and that the trustees to whom the conveyances of the land subsequently purchased were made, held it on the same trusts as the original property. This disposes of every question but the question whether the Defendant, Mr. *Blakeway*, is entitled to a life interest in the whole of his wife's share of the property. Now, the settlement of 1845 gave him a life interest in what then existed, but the settlement contains no covenant to settle after-acquired property of the wife. Her interest in the land subsequently purchased belonged to her, and she was entitled to it, and there is no equity in favour of her legal personal representative to say, that property which is found in one condition shall be taken to be in another condition.

We have been much pressed with the judgment of Vice-Chan-

cellor *Kindersley* in the case of *Darby* v. *Darby* (1); but I think that what his Honour there said has no application to the facts of the present case. His Honour says: "What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie." And again (2): "If it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner." The Vice-Chancellor founds his judgment upon this, that on the dissolution of a partnership all the partnership property is liable to be sold at the instance of any one of the partners. In the present case no one of the so-called partners could have insisted on such a sale. I think, therefore, that the decision of the Master of the Rolls was quite right, and that the appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

It is quite clear that the deed of 1799 cannot affect the question, for at this time no one could file a bill to enforce the execution of the trusts of that deed. If, therefore, there had been no deeds of conveyance antecedently to the marriage of Mrs. *Blakeway*, there would have been considerable difficulty in coming to a conclusion; it so happens, however, that before Mrs. *Blakeway's* marriage additional lands were purchased, and were conveyed to trustees, who

(1) 3 Drew. 495, 503. (2) 3 Drew. 506.

L. JJ. 1869 STEWARD v. BLAKEWAY.

executed declarations of trust to the effect that they held the land conveyed to them upon trust for the several parties interested, their heirs and assigns. Moreover, the interest of Mrs. *Blakeway* in the lands so purchased is in the settlement made on her marriage treated as real estate. The lands purchased subsequently to her marriage were conveyed to trustees in the same way, and from the communication of the partnership accounts to Mr. *Blakeway* it must be inferred that Mrs. *Blakeway* was aware of the purchases of land which were made and assented to them. At first sight, no doubt, the purchases of land appeared to have been treated in the partnership books just in the same way as purchases of stock in trade; but when you come to look into the matter you find that the land was always treated by the parties as real estate. The whole foundation, therefore, of the doctrine that one partner is entitled as against the other partners to have land belonging to the partnership sold is wanting. It is clear that there was really a part-ownership of a kind very analogous to part ownership of a ship, and a bill by one of the co-owners against the others for a sale of the land would have failed. The only other question is, whether Mr. *Blakeway* is entitled to a life interest in his wife's share of the lands purchased during the marriage. But it is clear that he cannot be so entitled, because, so far as she was concerned, those purchases were made out of her separate income, which was not included in the settlement. The appeal must, therefore, be dismissed with costs.

Solicitors: Mr. *J. C. T. Steward*; Mr. *William Hobart Rees*; Messrs. *C. & C. R. Cuff*.

In re LONDON MARINE INSURANCE ASSOCIATION.

L. JJ.
1869
June 22.

SMITH'S CASE.

Mutual Insurance Association—Unstamped Policy—35 *Geo.* 3, *c.* 63.

S. agreed by writing to become a member of an association each member of which on effecting an insurance on his own ship became bound to contribute to the loss of any other member. *S.* agreed to become a member in respect of an insurance for £300 on his own ship, but no stamped policy was ever executed. He contributed to the losses of other members, and his own ship having been injured he made a claim in respect of it, but before anything had been paid the association was ordered to be wound up :—

Held (affirming the decision of *James*, V.C.), that under 35 Geo. 3, c. 63, no agreement for insurance of ships can be valid unless duly stamped according to that Act, that therefore there was no evidence of a binding mutual contract for insurance having been entered into, and that *S.* was not a contributory.

THIS was an appeal by the official liquidator from an order of Vice-Chancellor *James* removing the name of Mr. *Smith* from the list of contributories of the *London Marine Insurance Association.*

The association was formed on the principle of mutual insurance, the members of which by virtue of membership became underwriters of each other's ships. Each member effected an insurance on his own ship, and the members were liable to contribute to any loss in proportion to the amounts of their respective insurances on their own ships. Each person who became a member signed a written application to insure his ship, stating the amount for which he wished to insure, and the particulars of his ship. If the proposal was accepted a policy was issued to him, and he executed a power of attorney, by which all the members authorized *Henzell*, the secretary, to underwrite policies on ships approved by the committee of the association, and covenanted with him for payment of their proportionate shares of all losses that might occur.

On the 1st of September, 1864, *Smith* wrote to *Henzell* asking for a copy of the rules, and expressing an inclination to effect an insurance. *Henzell* replied on the following day, inclosing a copy of the rules, and stating that a surveyor would inspect the ship. *Smith*, on the 6th, wrote to *Henzell* a letter, inclosing the report of

L. JJ. 1869 SMITH'S CASE.

Johnson, a surveyor, and the following form of application signed by himself:—

"I, the undersigned *J. W. Smith*, do hereby authorize and empower you to insure in the *London Marine Insurance Association* the sum of £300 on the ship *Holywood*, of the port of *Shields*. And I hereby acknowledge myself to be a member of the said association under and subject to the rules, regulations, and warranties thereof, and I authorize you or any three members of the committee for the time being for me, or in my name as such member, also to sign and underwrite all policies of insurance upon all ships that may from time to time be approved of by the committee of the said association in such sums respectively as they may think proper, and I undertake to accept and pay all drafts for losses and contributions that shall be drawn, made, or ordered to be paid by the said committee, and I also undertake to abide by the rules, regulations, and warranties of the said association in every respect. Risk to commence from the 6th of September."

Henzell, on the 7th of September, replied, "I am duly in receipt of your favour of yesterday, inclosing offer signed for £300, *Holywood*, together with report by Mr. *Johnson*. This latter document is perfectly satisfactory, and we will in accordance accept the vessel for £300, risk commencing September. I send you policy, and will be glad if you will send P. O. order for the entrance fee, £2 0*s*. 6*d*."

Smith replied on the following day, "I beg to inclose you P. O. order for £2 0*s*. 6*d*. as requested for entrance fees, and will feel obliged by your sending policy per return."

No policy, however, was ever sent, the document sent him being only an unstamped copy headed with the word "copy," and it now appeared that no stamped policy had ever been in existence. *Smith* never executed the power of attorney. Matters, however, went on upon the footing of his being a member, and the period for the assurance having expired on the 20th of February, 1865, he paid his entrance fee for another year. A call of £13 3*s*., being his quota of the loss on some other ships, was made on him, payable on the 23rd of April, 1865, and he paid it. On the 1st of February, 1865, the *Holywood* having been injured at sea, he wrote to the secretary making a claim, stating that the ship was also insured

in a society at *South Shields*. The secretary replied that as the *South Shields Club* had the matter in hand the association would follow their decision. The *South Shields Club* admitted the claim, and according to their decision the association would have had to pay £70 16*s.*; but, before the *South Shields Club* had come to a final conclusion, an order was made, on the 1st of July, 1865, for winding up the association. On the 26th of April, 1869, Vice-Chancellor *James* made an order removing the name of *Smith* from the list of contributories, on the ground of no stamped policy of insurance ever having been executed on his ship. This order the official liquidator now moved to discharge.

Mr. *Eddis*, Q.C., and Mr. *Lindley*, for the appeal motion, contended that although under 30 Vict. c. 23, s. 7, no agreement for insurance can now be good unless embodied in a duly stamped policy, yet as the law then stood a mutual agreement to insure each other's ships was good without stamped policies. They referred to 35 Geo. 3, c. 63, s. 14; 54 Geo. 3, c. 144; 7 Vict. c. 21; *Taylor* v. *Dean* (1); *Bromley* v. *Williams* (2); *Harvey* v. *Beckwith* (3); *Mead* v. *Davison* (4). They also contended that *Smith* had estopped himself by delay and assertions of being a member: *Underwood's Case* (5).

Mr. *Macnaghten*, *contrà*, was not called upon.

SIR C. J. SELWYN, L.J.:—

We entertain no doubt that the Vice-Chancellor was right in ordering the name of Mr. *Smith* not to be included in the list of contributories. The question depends entirely upon the construction of the Act 35 Geo. 3, c. 63. The case of the Appellant cannot be put more favourably to him than by saying that a contract in writing was entered into and for some time acted upon by both parties to it. What, then, was that contract? In my judgment it was a contract for insurance. Then how is that contract affected by the Stamp Acts? Assuming that before the Act of 1867 a policy of insurance was not necessary, still the question remains whether this was not a contract for insurance within

(1) 22 Beav. 429.
(2) 32 Ibid. 177.
(3) 12 W. R. 819, 896.
(4) 3 Ad. & E. 303.
(5) 5 D. M. & G. 677.

L. JJ. 1869 SMITH'S CASE.

the meaning of the Act 35 Geo. 3, c. 63. Now, sect. 1 of that Act provides that from and after the 5th of July, 1795, there shall be raised, levied, collected, and paid for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any insurance upon any ship or ships shall be engrossed, printed, or written, the stamp duties thereinafter mentioned. A stamp duty therefore is imposed upon every writing effecting an insurance, and this casts upon the Appellants the duty of shewing that these contracts of mutual insurance are exempt from the Act. Then sect. 11 enacts that "every contract or agreement which shall be made or entered into for any insurance in respect whereof any duty is by this Act made payable, shall be engrossed, printed, or written, and shall be deemed and called a policy of insurance." Then we come to sect. 14, which is most material, as it contains an express reference to agreements for insurance. That section enacts that "no insurance made or entered into in *Great Britain*, in respect whereof any duty is by this Act made payable, nor any contract or agreement for such insurance as aforesaid, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper on which such insurance shall be engrossed, printed, or written shall be stamped with a lawful stamp to denote the rate or duty as by this Act is directed, or to denote some higher rate or duty in this Act contained, and it shall not be lawful for the said Commissioners of the said Stamp Duties, or any of their officers, to stamp any vellum, parchment, or paper with any stamp directed to be provided or used by virtue of this Act at any time after any such insurance as aforesaid, or contract for such insurance, shall be engrossed, printed, or written thereon under any pretence whatever." That section plainly applies not merely to policies for insurance, but to any agreement or contract for such insurance. It is perfectly unlimited in its language, and there is no ground for the contention that the contract in the present case was not a contract for a policy of insurance, and therefore not within the words of the Act. I agree with the Vice-Chancellor, that it is not the duty of a Court of Law or of Equity to be astute to find out ways in which the object of an Act of the Legislature may be defeated. Some reliance was placed in argument upon the

18th section of the Act, which provides that nothing in the Act contained shall extend to subject any of the members, officers, or servants of the corporation of the *London Assurance* and the *Royal Exchange Assurance* to any of the penalties by the Act imposed for or by reason of their making any agreement to insure by any label, slip, or memorandum in writing upon unstamped vellum, parchment, or paper. The proviso, however, at the end of that section, "provided that in every such case a policy of insurance according to the agreement expressed in such label, slip, or memorandum, shall be made out according to one of the forms in the schedule to this Act annexed, and duly executed and stamped within three office days from the time of making such agreement as aforesaid," puts an end to the argument, and shews that this section cannot operate to take a contract for insurance out of the provisions of the Act. In the present case, therefore, the contract entirely failed, for by the Act we are precluded from taking notice of it as having any effect whatever at law or in equity. The name of Mr. *Smith* was, therefore, rightly omitted from the list of contributories. *Underwood's Case* (1), which was cited, has really no application, and there has been no such laches on the part of Mr. *Smith* as can disentitle him from now saying that there is no contract binding him to become a member of this company. The decision of the Vice-Chancellor was right, and the appeal motion must be refused with costs.

SIR G. M. GIFFARD, L.J.:—

Mr. *Smith* cannot be made a member of this company, unless it can be proved that he entered into a binding mutual contract for the insurance of ships. The contract, if there was any, was unquestionably a contract in writing, and I agree with the Vice-Chancellor that, having regard to the Act 35 Geo. 3, c. 63, there is no document which we can read as evidence of that contract. It is clear, under that Act, that every contract in writing for the insurance of ships must be stamped, and cannot be used in evidence if it is not, and there is no difference between a Court of Law and a Court of Equity with regard to the evidence which can be used in support of such a contract. Then it was said that Mr. *Smith*

(1) 5 D. M. & G. 677.

L. JJ. 1869 SMITH'S CASE.

is estopped from denying that he entered into this contract. But there is a complete answer to that argument in the fact that Mr. *Henzell* was the agent of the association as well as the agent of Mr. *Smith*. Moreover, with regard to laches, I can find nothing to induce me to say that Mr. *Smith* was too late in making his application to be removed from the list of contributories. The appeal must, therefore, be refused with costs.

Solicitors: Messrs. *Mercer & Mercer;* Messrs. *Young, Maples, & Co.*

L. JJ. 1869 *June* 22.

ALLEN *v.* JARVIS.

Bill of Costs—Accounts—Moderating Bill—Executor—Leave to appeal—Cons. Ord. xl. r. 25.

A solicitor who was one of the executors of a testator paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—

Held, that although as between solicitor and client the bill was no longer subject to taxation, yet, as against the executor, the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the Taxing Master to state whether any items objected to were fair and proper to be allowed, and to what amount.

The order of the Master of the Rolls affirmed, with variations.

Leave to appeal from a decision in Chambers, without counsel, and without any subsequent hearing in Court, cannot properly be given except by the Court of Appeal.

THIS was a motion by way of appeal from an order of the Master of the Rolls made in Chambers directing taxation of a bill of costs.

Thomas Allen, by will, dated the 14th of September, 1841, bequeathed his residuary personal estate to *Weston Jarvis* and *Whincop Jarvis* upon trust for his wife for life or widowhood, and after her death or second marriage in trust for *Fountaine Hogge* for life, and after his death in trust for his first son who should attain twenty-one years, or die under that age leaving issue male,

and if no such son, then upon trust for *Stephen Allen* for life, and after his death for his first son who should attain twenty-one years, or die under that age leaving issue male, with divers ulterior limitations. *Fanny Allen*, the testator's widow, and *Weston Jarvis* and *Whincop Jarvis*, were appointed executors. The testator died in October, 1841, and his will was proved by all the executors. The widow died in January, 1857, and *Weston Jarvis* and *Fountaine Hogge* on the 19th of October, 1857. Upon the death of *Fountaine Hogge*, *Stephen Allen* became tenant for life in possession of the testator's residuary personal estate. *Whincop Jarvis* was the sole executor of *Weston Jarvis*.

The suit of *Allen* v. *Jarvis* was instituted in 1865 by *Stephen Allen* and others against *Whincop Jarvis* and the personal representatives of *Fanny Allen* and of *Fountaine Hogge* to carry into execution the trusts of the will. *Whincop Jarvis* had shortly before filed his bill for the same purpose. In *Allen* v. *Jarvis* the bill alleged that *Weston Jarvis* had improperly retained large sums for costs, but no proof of overcharge was given at the hearing, and the answer denied it.

On the 11th of February, 1867, a decree was made in both suits, directing, among other things, an account of personal estate received by the executors respectively. *Weston Jarvis* had been the solicitor of the testator. In 1843 a bill of costs amounting to £691 5*s*. was made out by *Weston Jarvis*, and a copy delivered to the widow. On the 29th of June, 1843, he paid himself the amount of the bill by drawing a cheque on the bankers with whom the account of the executors was kept. *Whincop Jarvis*, in bringing in his accounts under the decree, entered this bill of costs among the items of discharge. The appeal also related to another bill of costs, the case as to which does not call for a report.

On the 22nd of May, 1869, the Master of the Rolls in Chambers, on the application of *Stephen Allen* and his co-Plaintiffs, without being attended by counsel, made an order which, after stating that certain items in the discharge, including the above, were for bills of costs, proceeded as follows:—

"The Judge doth, in pursuance of Cons. Ord. XL. r. 25, direct the Taxing Master to tax and settle the bills of costs in respect of such items, and which bills are marked with the initials of the

L. JJ. 1869 ALLEN v. JARVIS.

Chief Clerk, to assist him in making a proper allowance in respect thereof in taking such accounts."

Whincop Jarvis now moved by way of appeal from this order, having previously applied *ex parte* to the Master of the Rolls for leave to appeal without the case having been heard in Court or argued by counsel in Chambers, which leave the Master of the Rolls granted. It was not until the argument of the appeal motion had proceeded at considerable length that these circumstances transpired.

Mr. *Jessel*, Q.C., and Mr. *Batten*, for the Appellant:—

Weston Jarvis has been dead twelve years, and his bill cannot be taxed without manifest injustice, there being no person living who can vouch the items. Courts of Equity discourage stale demands, and the principles of *Ex parte Shackell* (1) rule this case. If this decision is to be upheld an executor will never be able to pay a solicitor's bill in safety. After this lapse of time how can a solicitor's bill be moderated any more than a butcher's or baker's? The allegation in the bill of improper retainer for costs was not proved, and if the bills were to be meddled with a case should have been made out for it at the hearing. *Re Harper* (2) shews that there could be no taxation against the solicitor.

Mr. *Southgate*, Q.C., and Mr. *Cracknall, contrà*:—

We do not ask for a taxation on the footing of every item being vouched: we only object to certain items, some of which are not properly chargeable against the capital of the estate, and others are manifestly excessive. As regards the analogy to a tradesman's bill, suppose the executor had supplied beer to the testator in his lifetime, and paid himself the bill after the testator's death, upon examining which bill it appeared that he had charged 5*s.* per gallon for the beer supplied to the household, can any one say that such a bill would be allowed him in full on passing his accounts? All circumstances must be attended to; but due regard being had to them, every accounting party must vouch his items of discharge.

At the conclusion of the Respondent's argument, the Court

(1) 2 D. M. & G. 842. (2) 10 Beav. 284.

stated to Mr. *Jessel* that, as at present advised, their Lordships proposed to vary the order by substituting for the direction to tax and settle the bill a direction to the Taxing Master to inquire and state whether any and which of the disputed items marked in red ink in the bill referred to were fair and proper to be allowed, and to what amount respectively.

Mr. *Jessel*, being satisfied with this, declined to reply.

SIR C. J. SELWYN, L.J.:—

This case comes before us in a most unsatisfactory position, and the further discussion of the matter has only confirmed the impression of the Lord Justice and myself, that an appeal ought not to be brought before this Court under circumstances similar to the present. We agree in saying that such an appeal as this will not in future be allowed to be heard. And speaking with the greatest respect for his Lordship, the Master of the Rolls, I am satisfied that if the matter had been brought to his attention he would not have thought of giving any direction as to liberty to appeal to this Court, inasmuch as an application for leave to appeal in an irregular manner must be heard by the Court of Appeal, and not by the Court below. I hope, therefore, it will be understood that although, as the matter had proceeded so far before we were informed of the irregularity, we have, for the sake of saving expense, thought right to deal with it, we shall not do so on any future occasion in a case similarly circumstanced.

Proceeding, then, to the matter in dispute, it appears that the testator died in 1841, but that the decree was not made until the 11th of February, 1867, and it is obvious from the mere statement of these dates that the executors against whom accounts are directed are necessarily placed in a position of considerable difficulty when called upon to bring in a discharge. But, on the other hand, the Court in taking such an account always bears in mind, and from my long experience in the Rolls Court I may say that, of all the Judges, the Master of the Rolls especially bears in mind, the length of time which has elapsed, and gives to the person rendering the account such a reasonable allowance in respect of that lapse of time as the justice of the case requires. But upon this

L. JJ. 1869 ALLEN v. JARVIS.

present appeal motion, which is a proceeding under the decree, and does not question the justice of the decree, we must take it to be established that justice required a decree for a general account to be made against the executors, including Mr. *Whincop Jarvis*, the executor of Mr. *Weston Jarvis*. Under these circumstances he brings in a discharge in the ordinary manner, and among the items in that discharge are included certain bills of costs. It appears to me impossible to contend that the parties beneficially interested are not entitled to question those items.

Then, if they are entitled to question them, the General Order of the Court, Cons. Ord. XL. r. 25, provides that where an account consists in part of any bill of costs, the Judge may direct the Taxing Master to assist him in settling such costs; and it would be a very strong thing for the Court of Appeal to interfere with the discretion of the Judge, who has, in taking such an account, desired the assistance of the Taxing Master. The first question we have to decide is, whether this order ought to be discharged, and it appears to me that—having regard to the facts that there is a general decree for an account, that the Plaintiffs' right to that account is indisputable, that this bill of costs is an item in the discharge, and that the Judge has desired the assistance of the Taxing Master—we cannot simply discharge the order.

Then there arises the question in what terms such an order ought to be expressed. It is admitted, of course, that after this lapse of time the matter as between solicitor and client is settled; the question is, whether the executor or the executor of the executor is be allowed these amounts. Now we find that in this particular case the bill of costs was the bill of costs of one of the executors, and that he, in conjunction with his co-executors, paid his own bill. That, of course, very greatly strengthens the case of the persons beneficially interested in the estate when they come and say that the matter must be looked into. But the order, the terms of which cannot, as I believe, have been brought to the notice of the Master of the Rolls, does not, according to the usual form familiar to us all, direct the moderation of this bill, but directs the Taxing Master to tax and settle it. That certainly is not according to my impression of the practice of the Court under circumstances such as exist in the present case: that is to say,

where the testator has been dead for a great length of time, where the bill has been paid, and where the question in substance is whether the bill is fair and proper, and such as ought, under the existing circumstances, to be allowed to the executors in their discharge. I think, therefore, that without in the least degree interfering with the judgment or with the discretion of his Lordship, the Master of the Rolls (for I believe his attention was never called to the terms of this order), the order ought to be modified by striking out the direction to the Taxing Master to tax and settle the bill, and substituting a direction that the Taxing Master shall inquire and state whether any and which of the disputed items marked in red ink in the bill are fair and proper to be allowed, and to what amount respectively. I think that both parties ought to bear their own costs of this appeal.

SIR G. M. GIFFARD, L.J.:—

I quite agree with what my learned brother has said as to the very unsatisfactory manner in which this appeal has been brought before the Court, and it is clear to my mind that the form of this order was not brought to the attention of the Master of the Rolls.

Now, although a great lapse of time has taken place since these costs were incurred and since the bill was paid, yet, having regard to the fact that there is a decree for an account, and to the much more important fact that the executor paid himself, I think it right that there should be an inquiry to ascertain whether, as regards the particular items complained of, the bill is a fair and proper bill or not. That is the proper form, and not an order to tax and settle the bill, under which the Taxing Master must simply tax in the ordinary way; whereas in such circumstances the right and proper course is that the Taxing Master should merely look at the items as they appear on the face of the bill, and say whether they are fair and proper items. That being so, the order will be varied as my learned brother has suggested. I quite concur with him in saying that neither party ought to have any costs of this appeal, and I may repeat that if on any future occasion an appeal is brought before us in the shape in which this appeal is brought, we shall undoubtedly decline to hear it.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Wedlake & Letts.*

L. J. G.
1869
July 16.

ALTON *v.* HARRISON.
POYSER *v.* HARRISON.

Fraudulent Conveyance—13 *Eliz. c.* 5—*Fraudulent Preference*—*Bona Fides.*

A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the Court of Chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued:—

Held (affirming the decision of *Stuart*, V.C.), that the deed was not void under the statute 13 Eliz. c. 5, notwithstanding the fact that it conveyed the whole of the debtor's property for the benefit of some of his creditors, and that it contained a proviso that the debtor should remain in possession for six months.

THIS was an appeal from an order of Vice-Chancellor *Stuart*.

On the 8th of June, 1868, an order was made in the above causes that the Defendant, *T. Lichfield Harrison*, who was a nailmaker at *Belper*, should, on or before the 2nd of November, 1868, bring into Court to the credit of the causes the sum of £1327 7*s.* 3*d.*, which had been found due from him on account of a breach of trust.

The order was drawn up on the 1st of August, 1868, and served on the Defendant on the 1st of October. On the 24th of October, *Harrison* called a meeting of five of his creditors, not including any of the persons interested in the money ordered to be paid into Court; the result of which was the execution of an indenture, dated the 29th of October, 1868.

By this indenture, which was made between *T. L. Harrison* of the first part, *George Spencer* and *J. N. Harrison*, as trustees, of the second part, and the five creditors (whose names and debts were set forth in a schedule) of the third part, after reciting, in effect, that *T. L. Harrison* was indebted to such creditors, that they had urgently requested payment of their debts, and that he, being unable to comply with such request, had agreed to give security, witnessed that *T. L. Harrison* conveyed unto the said trustees, their heirs and

assigns, the hereditaments therein mentioned; and assigned unto them all his personal effects in and about *Lawn Cottage, Belper*, which comprised substantially all his property, upon certain trusts; and it was provided that if *T. L. Harrison* should, on the 29th of April, 1869, pay the said creditors their debts, there should be a re-conveyance and re-assignment; and *T. L. Harrison* covenanted with the creditors that he would pay their debts on the 29th of April, 1869, with interest thereon. The deed contained covenants that *T. L. Harrison* had a right to convey and assign, and for further assurance, and the creditors covenanted with *T. L. Harrison* that they would not sue him in respect of their debts till default should be made in payment. And it was declared that the trustees should stand possessed of the said real and personal estate upon trust to permit and suffer *T. L. Harrison*, his heirs, executors, administrators, and assigns, to hold, use, occupy, and enjoy the same, and to receive the rents and profits thereof, for the space of six months from the date, but not so as to let in or permit any execution, extent, sequestration, or other process against the said real and personal estate, or any part thereof, or against *T. L. Harrison*, his heirs, executors, or administrators, in respect thereof, and in case any such should be enforced, or attempted to be enforced, the present clause should thereupon cease and determine. And it was declared that in case of default in payment on the 29th of April, 1869, it should be lawful for the trustees to sell the personal effects, and, after six months' notice to *T. L. Harrison*, to sell the hereditaments; and that if any sale should take place, the trustees were to hold the proceeds upon trust to pay all expenses, and to satisfy the debts specified in the schedule, and interest and other moneys which should then be due upon the security of the deed, and then to pay the surplus, if any, to *T. L. Harrison*.

The debts mentioned in the schedule amounted in the aggregate to £1230, and interest from various dates, the earliest of which was the 31st of July, 1867. The deed was executed by all the parties to it, and it was registered as a bill of sale on the 17th of November, 1868.

Default was made by *T. L. Harrison* in the payment of the money into Court under the order of the 8th of June, 1868. On the 18th of December, 1868, a writ of sequestration was issued,

L. J. G. 1869 ALTON v. HARRISON. POYSER v. HARRISON.

and on the 23rd of December the sequestrators seized the personal estate included in the deed, and at the same time they entered into possession of the hereditaments. On the 24th of December notice was given to the sequestrators that the whole of the property sequestered belonged to the trustees of the deed. On the 28th of January, 1869, the trustees moved that the sequestrators might be ordered to withdraw from the possession of the effects seized; that the same might be delivered to them; that an inquiry might be directed as to the damage which they had sustained by reason of such sequestration; and that an inquiry might be made whether the trustees had any and what interest in the effects, and in the lands and hereditaments comprised in the deed of October, 1868. The sequestrators at the same time moved that they might be at liberty to sell the effects, and, after paying the expenses, be at liberty to pay the balance of the proceeds into Court to the credit of the causes. On these motions an order was made directing an inquiry whether the trustees had any and what interest in the property sequestered.

The Chief Clerk, by his certificate, certified that the trustees had not any interest in the property sequestered, nor in the hereditaments comprised in the mortgage deed; and the trustees having moved to vary the certificate, the Vice-Chancellor held that there being no sufficient ground for holding that the mortgage and bill of sale was executed for any other purpose than *bonâ fide* for securing the debts of the five creditors, the certificate must be varied by finding that the trustees under the deed had an interest in the estate. The sequestrators appealed from this decision.

Mr. *Mackeson*, Q.C., and Mr. *W. W. Cooper*, for the Appellants:—

The deed was fraudulent and void as against the sequestrators. The statute 13 Eliz. c. 5, declares such deeds void as are made with intent to defeat and delay creditors. If the sequestrators could have come in under the deed with the other creditors the case would have been different, but it was devised with the express object of defeating and delaying the sequestrators: *Henderson* v. *Lloyd* (1); *Evans* v. *Jones* (2). It would clearly have been an

(1) 3 F. & F. 7. (2) 11 Jur. (N.S.) 784; 3 H. & C. 423.

act of bankruptcy under the Bankruptcy Act, 1849, s. 67, if any of the excluded creditors had filed a petition in bankruptcy upon it. The words in that section are nearly identical with those in the statute of *Elizabeth*, and as the deed would have been void in bankruptcy, it follows that it is fraudulent against creditors under the statute of *Elizabeth*.

[The LORD JUSTICE GIFFARD:—The objects of the two statutes are different. The bankrupt laws are for the purpose of obtaining an equal distribution of the assets; the statute of *Elizabeth* had no such object.]

The Respondents relied on *Holbird* v. *Anderson* (1), and other cases to the same effect, but those cases only prove that a debtor may pay one creditor in preference to another. In the present case there is the additional element of an intent to defeat the other creditors. This is evidenced by the frame of the deed, by which all the property of the debtor is conveyed to the creditors. It is very different from a debtor allowing his creditor to have a *fi. fa.* or an *elegit*, for in that case he takes only a part of the property. There is also an advantage reserved to the debtor by providing that he may keep possession for six months, and the case is made stronger by the fact that the possession is made determinable on the issuing of any writ or sequestration against him.

[They also referred to *Stewart* v. *Moody* (2); *Goodricke* v. *Taylor* (3); *Ex parte Foxley* (4); *Wood* v. *Dixie* (5); *Nunn* v. *Wilsmore* (6); *Riches* v. *Evans* (7); *Hodgson* v. *Newman* (8).

Mr. *Dickinson*, Q.C., and Mr. *Solomon*, for the trustees of the deed, were not called on.

SIR G. M. GIFFARD, L.J.:—

There can be no doubt that *Harrison* executed this deed at a time when he knew that a writ of sequestration would be issued against him. But at the same time there can be no question that the law was laid down by the Vice-Chancellor, in his judgment,

(1) 5 T. R. 235.
(2) 1 C. M. & R. 777.
(3) 2 D. J. & S. 135.
(4) Law Rep. 3 Ch. 515.
(5) 7 Q. B. 892.
(6) 8 T. R. 521.
(7) 9 C. & P. 640.
(8) Cited 5 T. R. 236.

L. J. G.
1869
ALTON
v.
HARRISON.
POYSER
v.
HARRISON.

quite accurately, and in accordance with a long course of authorities, when His Honour said: "In this, as in all other cases of the same kind, the question is as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by *Harrison* honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect."

There is no question that under this deed the five creditors are to have the property, and are secured by means of it. Only two arguments have been raised upon the deed; first, on account of the proviso that *Harrison* should retain possession of the property for six months unless any sequestration or execution was issued against him; and secondly, upon the fact that the deed comprised the whole of the debtor's property. With respect to the first point, I think the proviso was consistent with the tenor and object of the deed. It was, in effect, a mortgage, not to become absolute for six months unless process should be previously issued against the mortgagor. With respect to the second point, it must be remembered that we are not now dealing with a case in bankruptcy. I asked, during the argument, why proceedings in bankruptcy had not been taken, and the only answer was, that it was desired to try the validity of the deed. If this appeal were to succeed the result would be, that one creditor would be paid in full, and the other creditors entirely left out, which is exactly that which the Appellants now complain of as unjust. I have no hesitation in saying that it makes no difference in regard to the statute of *Elizabeth* whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of *Elizabeth*. The appeal must therefore be dismissed with costs.

Solicitor for the Appellants: Mr. *F. H. Jeanneret*, agent for Mr. *Jackson, Belper*.

Solicitors for the Trustees: Messrs. *Scott & Co.*

In re UNION CEMENT AND BRICK COMPANY.
Ex parte PULBROOK.

L. J. G.
1869
July 9.

Solicitor's Lien—Solicitor to Official Liquidator—File of Proceedings in the Winding-up—General Order of 11*th Nov.* 1862, *Rule* 58.

The solicitor to an official liquidator has no lien for his costs on the file of proceedings in the winding-up and the documents relating thereto. A solicitor who had been employed by the official liquidator in the winding-up and afterwards discharged, was ordered to deliver up all such documents to the official liquidator.

Order of *Stuart*, V.C., affirmed.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, made on an adjourned summons, directing Mr. *Anthony Pulbrook*, who was formerly the solicitor of the official liquidator acting in the winding up of the *Union Cement and Brick Company, Limited*, to deliver up to the liquidator upon oath the file of proceedings in the matter, and all orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding up of the company, in the possession, custody, or power of the said *A. Pulbrook*.

On the 7th of August, 1867, the official liquidator had, with the sanction of the Court, appointed Mr. *Pulbrook* to be his solicitor in the matter of the winding-up; but had, in April, 1869, with the like sanction, discharged him from acting as such solicitor. Mr. *Pulbrook* refused to deliver up to the official liquidator the documents in question on the ground that he had a lien on them for his bill of costs in the winding-up.

The documents were those which the official liquidator had entered on the file of proceedings in pursuance of the 58th rule of the Order of 11th November, 1862, which provides that "all orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding up of any company, shall be filed by the official liquidator, as far as may be, in one continuous file, and such file shall be kept by him, or otherwise as the Judge may from time to time direct."

Mr. *Pulbrook* appealed from the order of the Vice-Chancellor.

L. J. G.
1869
In re UNION CEMENT AND BRICK CO. *Ex parte* PULBROOK.

Mr. *Glasse*, Q.C., and Mr. *Brooksbank*, for the Appellant:—

There is no power given by the *Companies Act*, 1862, to make such an order as the present, which is not merely for inspection of the documents, but for taking them out of the hands of the solicitor. If the 58th rule of the Order of 11th November, 1862, has the effect of overriding the lien of the solicitor, it was beyond the powers of the Judges to make such a rule, for they had power, under the 170th section of the Act, merely "to make rules concerning the mode of proceeding to be had for winding up a company." But we contend that it was not intended to make the duties of the official liquidator override the lien of the solicitor. It has never been held that assignees in bankruptcy can take out of their solicitor's hands the papers connected with the bankruptcy. On the same principle a trustee cannot take the deeds of the trust property out of the hands of his solicitor without paying his costs.

[They cited *Potter's Case* (1); *Hollis* v. *Claridge* (2); *Weymouth* v. *Knipe* (3); *In re Cameron's Coalbrook Railway Company* (4).]

Mr. *Dickinson*, Q.C., and Mr. *Everitt*, for the official liquidator, were not called upon.

SIR G. M. GIFFARD, L.J.:—

The only question is, whether the Vice-Chancellor's order was right, having regard to the 58th rule. It is manifest on the face of the order that it is confined to those documents which are mentioned in that rule. I am clearly of opinion that the rule must be taken as forming part of the appointment of the official liquidator; and that every solicitor who acts for an official liquidator must be taken to know what is the extent of his duty and his power with respect to those documents. His power does not exceed his duty, which is to keep these documents, and to deal with them as the Judge shall direct. What, then, is the nature of the solicitor's lien for his costs? He can have no higher right than his client has. The official liquidator can himself get no lien on the documents, and consequently he cannot, by contract or otherwise, give his solicitor any such lien. I am, therefore, of

(1) 1 De G. & Sm. 729.
(2) 4 Taunt. 807.
(3) 3 Bing. N. C. 387.
(4) 25 Beav. 1.

opinion that Mr. *Pulbrook* is not entitled to retain the documents, and that the Vice-Chancellor's order was right, and the appeal must be dismissed with costs.

L. J. G. 1869 *In re* UNION CEMENT AND BRICK CO. *Ex parte* PULBROOK.

Solicitor for the Appellant: Mr. *Pulbrook.*
Solicitor for the Official Liquidator: Mr. *Seal.*

In re PHILLIPS.

L. J. G. 1869 *July* 2.

Lunacy—Practice—Lunatic Mortgagee—Reconveyance—Trustee Act—Vesting Order—Costs of Mortgagor.

Where the committee of a lunatic mortgagee presents a petition under the *Trustee Act* for a reconveyance of the mortgaged estate to the mortgagor, the mortgagor is not entitled to his costs out of the lunatic's estate, even though served with the Petition.

IN this case a Petition in lunacy was presented in the matter of *William Phillips*, a lunatic.

It appeared, by the report of the Master in Lunacy, that the fortune of the lunatic consisted in part of an absolute interest in certain mortgages. The mortgagors were about to pay off the mortgages, and the committee accordingly presented a Petition in the lunacy, and under the *Trustee Act*, 1850, praying that he might be appointed to convey the respective mortgaged estates to the mortgagors at the expense, in each case, of the mortgagors. The mortgagors were served with the Petition, which was heard on the 4th of June, when an order was made according to the prayer of the Petition, with a direction that the costs of all parties of the application should be paid out of the lunatic's estate.

Mr. *Badnall*, for one of the mortgagors, now mentioned the case again, and stated that, having regard to the authorities, there was some doubt whether the costs of the mortgagors could properly be paid out of the lunatic's estate, even though they had been served with the Petition. He referred to *In re Wheeler* (1), and *In re Biddle* (2).

(1) 1 D. M. & G. 434. (2) 23 L. J. (Ch.) 23.

L. J. G. 1869 *In re* PHILLIPS.

SIR G. M. GIFFARD, L.J.:—

In the case of *In re Rowley* (1), the Lords Justices directed the mortgagors' costs of a similar Petition to be paid by the committees and allowed to them out of the estate, but intimated their opinion that in future mortgagors ought not to be served with such Petitions. I wish it to be understood as a settled rule that, for the future, in cases of this kind a mortgagor, whether served or not, will not have his costs out of the lunatic's estate. I think that under no circumstances a mortgagee ought to pay the mortgagor's costs.

Solicitor: Mr. *H. Tyrrell*, agent for Messrs. *Challinor & Co.*, *Leek*.

L. J. G. 1869 *July* 2.

Ex parte ASTBURY.
Ex parte LLOYD'S BANKING COMPANY.
In re RICHARDS.

Bankruptcy—Trade Fixtures—Part of a Machine—Rolls used in Rolling Mill—Straightening Plates—Weighing Machines—Mortgagor and Mortgagee.

5 QB. 139, 125 ? 8 Ch. 1074 10 Ch. 14 Ch D 385

An iron manufacturer made an equitable mortgage of his rolling mills, of which he held a lease, and shortly afterwards became bankrupt. Besides the fixed machinery, the mills contained the following chattels used in the manufacture:—(1). A large number of duplicate iron rolls of various sizes made to be fitted into the machine, and used for different sizes of iron; some of these were fitted to the machine, and had been used, and others had not yet been fitted. (2). Straightening plates, which were broad iron plates embedded in the floor for straightening the iron when taken out of the furnace. (3). Weighing machines, which were deposited in holes dug in the earth and lined with brickwork, so that the weighing plate was level with the surface of the ground, but which were not fixed to the brickwork:—

Held, on a case stated in the bankruptcy between the mortgagees and the assignees—

First: That such of the rolls as had been fitted to the machine were fixtures, and passed to the mortgagees; but that such of the rolls as had not been fitted to it were not fixtures, and belonged to the assignees.

Secondly: That the straightening plates were fixtures, and passed to the mortgagees.

---

(1) 1 D. J. & S. 417.

Thirdly: That the weighing machines were not fixtures, and belonged to the assignees.

Metropolitan Counties Society v. *Brown* (1) distinguished.

THIS case came before the Court on appeal from an order of Mr. Registrar *Tudor*, acting for the Commissioner of the *Birmingham* Court of Bankruptcy, made on a special case submitted for his decision.

It appeared from the special case that on the 28th of June, 1867, the firm of Messrs. *Job Richards & Co.*, iron manufacturers at *Smethwick*, which comprised the present bankrupts, *Job Richards* and *Richard Hill*, and also *T.* and *L. Jenkins*, being at that time indebted to *Lloyd's Banking Company, Limited*, deposited with them the lease of their rolling mills at *Smethwick*, accompanied by a memorandum in the following terms:—

"Memorandum. We, the undersigned *Job Richards, L. Jenkins, Richard Hill*, and *Thomas Jenkins*, trading together as iron-masters at *Smethwick*, in the county of *Stafford*, under the style or firm of *Job Richards & Co.*, have this day deposited with *Lloyd's Banking Company, Limited*, the deed mentioned in the schedule hereunder written, to be retained by the company by way of a continuing security to them for payment on demand of all moneys and liabilities already paid or incurred, or which the company may at any time advance, pay, or incur to or for the said firm of *Job Richards & Co.*, whether on current account or by the discount of or otherwise in respect of bills of exchange, promissory notes, or other negotiable securities drawn, accepted, or indorsed by the said firm, together with interest, commission, banking charges, law and other costs, charges, and expenses; and for a more effectual security we undertake at our own expense, when required by the company, that we and all other necessary parties will execute to the said company, or as they shall direct, a mortgage of all our estate and interest in the said deed, which mortgage shall contain a power of sale and all usual clauses."

The account was continued as an open account with the four partners up to the month of August, 1867, when the partnership between the bankrupts and Messrs. *Jenkins* was dissolved, and the

(1) 26 Beav. 454.

L. J. G.
1869
Ex parte ASTBURY.
Ex parte LLOYD'S BANKING CO.
In re RICHARDS.

bankrupts took the assets and debts of the old firm, including a balance of upwards of £10,000 due to *Lloyd's Banking Company*.

On the 11th of January, 1868, the bankrupts executed to the banking company a legal mortgage of the mills; and on the 18th of January the banking company took possession under the mortgage. On the 30th of January a petition of bankruptcy was filed against them, and they were declared bankrupts, and Messrs. *Astbury*, *Bloomer*, and *Dickenson* were appointed assignees.

The mortgage deed had a schedule annexed to it, containing a list of certain chattels used in the rolling mills, which were the subject of the present dispute between the assignees and the mortgagees. These chattels consisted of a considerable number of iron rollers described as finishing rolls, colting rolls, guide rolls, hard rolls, and bolting down rolls; and also four patent weighing machines, and four straightening plates.

It was admitted in the special case that the rolls and other chattels comprised in the last-mentioned schedule were necessary to the carrying on of the bankrupts' business. If they had been removed, others of a similar description must have been substituted.

The assignees contended that the mortgage security was void against them so far as related to the duplicate rolls and other unfixed machinery and chattels.

It was admitted in the argument that the mortgage deed of the 11th of January, 1868, could not be supported against the assignees, by reason of its having been made on the eve of bankruptcy; but the mortgagees claimed the chattels as fixtures attached to the iron mills, under the equitable mortgage and deposit of the 28th of June, 1867. The assignees admitted that one set of rolls passed with the machine to the equitable mortgagees. Evidence was adduced before the Registrar as to the nature of the chattels, in which the following facts were proved:—

The rolls were loose iron rollers, which were fitted into the rolling machine. The machines, when made, were fitted with one set of rollers, and others were ordered and supplied according to the work required, different sized rolls being used for different descriptions of iron. When the rolls first came from the manufacturer they had to be fitted to their bearings in the machines by

filing their ends, and when so fitted they were grooved according to the size of the iron which they were intended to roll. At the date of the equitable mortgage there were several duplicate rolls which had been used or were ready for use, and others which had been supplied by the manufacturers, but had never been fitted to the machine.

There were four weighing machines, which were placed in holes dug in the ground and faced with brickwork. The machines rested on the brickwork at the bottom of the holes, the weighing plates being on a level with the surface of the ground. It was stated in the evidence that the machines might be removed without injuring the brickwork, and that similar machines were often placed upon wheels instead of resting on the ground.

The straightening plates were broad plates of iron for straightening the bars of iron when taken out of the furnace. They were laid on brickwork and bedded in the earth of the floor, and the rest of the flooring was composed of iron plates, which fitted round them so as to make an even surface.

The Registrar was of opinion that the rolls passed with the mills to the mortgagees, as being part of the machinery; from this decision the assignees appealed. But he held that the weighing machines and straightening plates did not pass; and the mortgagees appealed from this decision.

Mr. *Jessel*, Q.C., Mr. *Little*, Q.C., and Mr. *Archibald Smith*, for the assignees, the Appellants in the first appeal:—

We contend that the duplicate rolls were not fixtures, and therefore did not pass with the mills to the mortgagees. When a machine is supplied one set of rolls is sent with it, the others are made to order according to the description of iron to be rolled. They were like the types in a printing press, or the patterns in a calico printing machine. They are made of different sizes, and can be fitted to the machine simply by filing the ends. It is impossible that the duplicates can be part of the machinery, when only one set can be in the machine at once.

Mr. *Fry*, Q.C., and Mr. *Finlay Knight*, for the Respondents, the mortgagees:—

There is no question that the rolling machines are trade fixtures.

L. J. G.
1869
Ex parte ASTBURY.
Ex parte LLOYD'S BANKING CO.
In re RICHARDS.

The only question is, whether the rolls are part of the machine. The machine is not perfect and cannot be worked without them. This was, admitted by the Appellants when they conceded that we were entitled to one set of rolls. The others are added as required; it is like the enlargement of the machine to suit increasing business. The fact of the rolls being removeable from the machine, or being actually removed at the date of the mortgage, makes no difference; as in the case of a millstone: *Wystow's Case*, cited in a note to *Place* v. *Fagg* (1); or of window frames and shutters: *Johnston* v. *Dobie* (2). The same principle is laid down in *Fisher* v. *Dixon* (3), and *Mather* v. *Fraser* (4).

Mr. *Jessel*, in reply:—

In *Johnston* v. *Dobie* the house was not finished, and the Court decided, in accordance with Scotch law, that the window frames were "destined" to be annexed to the freehold. But the English law knows no such principle as that of "destination." *Wystow's Case* is rather in our favour, for *Fitzherbert*, after saying that if a millstone be taken into the house to be picked, it cannot be distrained, adds: "But if there were another millstone lying there, he may well enough distrain that, and so of the windows, doors, &c." (5)

SIR G. M. GIFFARD, L.J.:—

The questions in cases of this description are, for the most part, much more questions of fact than of law, for to my mind the law has been settled, but the facts necessarily differ more or less in each particular case.

With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In *Mather* v. *Fraser* it was decided that the article must be an essential part of the machine. I think that was all that it

(1) 4 Man. & Ry. 277, 280, n.
(2) Morison, 5543.
(3) 12 Cl. & F. 312.
(4) 2 K. & J. 536.
(5) 4 Man. & Ry. 280, n.

was necessary to lay down in that case. The *dictum* of Lord *Cottenham* in *Fisher* v. *Dixon* (1) was that all "belonging to the machine" would pass, and I should say in this case the proper test to lay down would be that the chattel must be "something which belongs to the machine as part of it."

Now, these machines were rolling machines, and there appear to be connected with rolling machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered, it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them—I am not now speaking of rolls which can be considered as, in any sense, unfinished, but of duplicate rolls which have been actually fitted to the machine—I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. I think, therefore, that each set of rolls necessarily belongs to the machine as part of it. I do not think that this is at all affected by the *dictum* of *Fitzherbert;* but if it was, my answer would be, that this subject has been considered much more of late years than it was in olden times, and that the matter decided was with regard to a question of distress. If it were desired to reduce the question to an absurdity, it would be by supposing a case of duplicate latch keys to a door, and holding that one only should pass, and not the other. The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term "belonging to the machine as part of it."

Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size.

Then we come to another and different class of rolls, and there I confess I differ from the Registrar who has given his opinion in this case. I allude to those rolls which had been made for the

(1) 12 Cl. & F. 312.

L. J. G. 1869 *Ex parte* Astbury. *Ex parte* Lloyd's Banking Co. *In re* Richards.

purpose of being used in this machine, and had been sent to the mill for that purpose, but had never been fitted to the machine, and which required something more to be done to fit them to the machine in order that they might be used in it. I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine.

Therefore I am of opinion that, as regards the duplicate rolls, as regards the rolls of different sizes, as regards all the rolls which have been actually fitted to the machine, they belong to the machine as part of the machine—they are, in fact, essential parts of the machine. But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it. Therefore, in that respect, the order will be varied.

The second appeal was then argued.

Mr. *Fry*, Q.C., and Mr. *Finlay Knight*, for the Appellants, the mortgagees:—

First, with respect to the weighing machines; although not attached to the brickwork, they are buried in the earth, and could not be removed without injury to the brickwork. As to the straightening plates, they are part of the flooring of the mill, like the hearthstone in a room, and could not be removed without disturbing the earth of the floor.

Mr. *Jessel*, Q.C., Mr. *Little*, Q.C., and Mr. *A. Smith*, for the Respondents:—

The weighing machines are sunk in the earth merely for convenience, in order to facilitate the iron being laid on them, and

the brick foundation does not make them fixtures any more than a statue or a telescope would become a fixture by resting on a stone pedestal. The true test is, whether the removal causes damage to the freehold: *D'Eyncourt* v. *Gregory* (1); *Bates* v. *Duke of Beaufort* (2); *Hellawell* v. *Eastwood* (3).

The same arguments apply to the straightening plates, and the point was expressly decided in *Metropolitan Counties Society* v. *Brown* (4).

But supposing these chattels were fixtures, they would not pass to the mortgagees, for the mortgagor being a leaseholder, and the fixtures being tenant's fixtures, they were his absolutely, and formed no part of his leasehold interest, which alone was conveyed to the mortgagees.

Mr. *Fry*, in reply.

SIR G. M. GIFFARD, L.J.:—

The two points which remain to be disposed of in this question are, first, as to the straightening plates; and, secondly, as to the weighing machines. I cannot agree to the suggestion of Mr. *Jessel* that because the mortgagor in this case was a leaseholder and not a freeholder the articles which are fixtures will not pass to the mortgagee. Whether he is a freeholder or a leaseholder, the same rule clearly and indubitably would apply, and the only question is, whether the straightening plates and the weighing machines are fixtures.

With regard to the straightening plates, two cases were cited, one of the *Metropolitan Counties Society* v. *Brown*, and another of *Bates* v. *Duke of Beaufort*. The latter case clearly has no application, for that was a case in which, there being chattels which, as between the lessor and lessee, the lessee might remove, an execution creditor of the lessee was held entitled to take them. As regards the former case, the point was wholly different from the point in this case, because there the straightening plates certainly were not fixed in the mode in which these straightening plates appear from the evidence to be fixed. It is only necessary to read

(1) Law Rep. 3 Eq. 382.
(2) 8 Jur. (N.S.) 270.
(3) 6 Ex. 295.
(4) 26 Beav. 454.

L. J. G.
1869
Ex parte ASTBURY.
Ex parte LLOYD'S BANKING CO.
In re RICHARDS.

some portions of the evidence to shew that these straightening plates are clearly fixtures, and, in fact, just as much part of the floor as any pavement would be, and, certainly, it would be astonishing to me if an ordinary pavement were regarded as a thing that could be removed by a mortgagor as against his mortgagee. [His Lordship then referred to the evidence, and continued:—] Upon this evidence I must assume that the plates round the straightening plates are part of the ordinary floor of the place, and that the straightening plates are just as much part of the ordinary floor as the plates around them. I look upon these straightening plates as in the same position as a flagstone laid down and let in, and certainly if anything in the world is a fixture I should conceive that a flagstone laid down and let in would be a fixture. In fact, the Registrar seems to have fallen into this mistake by laying rather too much stress on what was said in the case of *Mather* v. *Fraser* (1), as to nothing being a fixture which could stand by its own weight. No doubt a flat plate will rest by its own weight, but if you have it laid in, embedded, and overlaid with that which is part of the permanent floor, and the permanent floor cannot be removed without damage to the freehold, as it clearly cannot be here, I can have no doubt whatever but that the straightening plates are fixtures.

But, then, with regard to the weighing machines I think the case is wholly different. The evidence is clear that weighing machines of this description are frequently put upon wheels, and are so used. As regards these weighing machines, it appears that where they are placed inside the building the floor is prepared for them, and where they are placed outside the soil is prepared for them; that is to say, a square receptacle is made and is bricked, and when that square receptacle is made and bricked the weighing machine is placed in it, and may, of course, be taken out again, for it is not fixed by nails, or by screws, or in any other way. One of the witnesses says: "I took a piece of thin iron about half an inch thick, and trickled around the outside of it, and from that I could see there was some brickwork put up in order to secure the outside; there was a space all round of from five-eighths to three-fourths of an inch." Mr. *Fry* argued that the brickwork

(1) 2 K. & J. 536.

was the same thing as if there had been a frame, and that the brickwork is part and parcel of the machine. To that argument I cannot assent. Suppose in this case a number of brick places had been made, into which it had been convenient to put weights, beyond all doubt the weights would not have been fixtures. In the same way, if there had been a foundation of granite for a cannon or a large telescope, neither the cannon nor the large telescope would be a fixture. The preparation of the soil does not make the machine a fixture, nor does the fact of its being put into the receptacle so prepared for it make it a fixture.

Therefore, as regards the straightening plates the decision below will be reversed, and as regards the weighing machines it will be affirmed. There will be no costs of the appeal, and the deposit will be returned.

Solicitors: Messrs. *Church, Sons, & Clarke,* agents for Messrs. *James & Griffin, Birmingham*; Messrs. *Sharp & Ullithorne,* agents for Mr. *Richards, Birmingham.*

Ex parte RIPPON. *In re* ANDREW.

Bankruptcy—Proof—Secured Creditor—Forfeiture of Shares.

A. was a shareholder in a joint stock bank, the deed of settlement of which provided that if any shareholder did not, on demand, pay all moneys which he owed to the bank, the directors might declare his shares forfeited for the benefit of the other proprietors, but that he should, notwithstanding such forfeiture, remain liable to pay the full amount of his debt. The directors gave *A.* a notice on the 25th of November to pay on the 2nd of December a large sum which he owed them, in default of which his shares would be forfeited. On the 28th of November he filed a declaration of insolvency, and was adjudged bankrupt on the following day. On the 3rd of December the directors forfeited his shares. On the bank coming in to prove, the Commissioner held the forfeiture invalid, and admitted the proof for the amount of the debt less the value of the shares, as in the case of a secured creditor:—

Held, on appeal, that the validity of the forfeiture, if questioned, must be tried in an independent proceeding, and that the proof must be admitted for the full amount of the debt, without prejudice to the right of the assignees to question the forfeiture.

THIS was an appeal by the *Manchester and Liverpool District Bank* from a decision of Mr. Commissioner *Jemmett.*

L. J. G.
1869
Ex parte RIPPON.
In re ANDREW.

In 1867 the bankrupt *Andrew* was indebted to the bank in a large sum advanced to him as a customer in the ordinary course of dealing. To secure the advances he had given them a memorandum of deposit, dated the 2nd of August, 1866, and a mortgage dated the 27th of August, 1866. He was also the holder of seventy-one shares in the bank, the deed of settlement of which contained the following provision :—

"That every proprietor of a share or shares in the capital of the company, and the husband of every female proprietor, and the executors, administrators, and legatees of every deceased proprietor, and the assignees of every bankrupt and insolvent proprietor, shall, on demand by the board of general directors, pay, or cause to be paid, at the principal place of business for the time being of the company, all and every sums and sum of money due or owing from such proprietor, at law or in equity, either alone or jointly with any other person or persons, to the company; except nevertheless out of the operation of this clause all instalments on shares as to which a distinct provision is herein made. And the share or shares of every proprietor who, or whose executors, administrators, legatees, or assignees, or in the case of a female proprietor whose husband, shall omit so to do, and every dividend and bonus declared upon such share or shares, shall be liable to be forfeited to the company for the benefit of the other proprietors thereof, and every proprietor whose share or shares shall so become forfeited shall be thereupon considered as expelled from the company, and no longer a proprietor thereof; but the forfeiture of the share or shares of such proprietor, and the expulsion of him or her from the company, shall not be considered as discharging him or her, or his or her executors, administrators, legatees, or assignees, or the husband of any female proprietor, from the payment of the sum or sums of money due or owing from him or her to the company, or from any action or suit for obtaining the payment of the same respectively, or from any further liabilities or obligations in respect of his or her share or shares; but such proprietor, and his or her executors, administrators, legatees, or assignees, and in the case of a female proprietor the husband of any such female proprietor, shall be and continue liable to the payment of such sum or sums of money, and to all further liabilities and obligations in respect of his or her

share or shares, and to any actions and suits for the payment of the same respectively, to all intents and purposes, as if there had been no such forfeiture or expulsion as aforesaid."

On the 25th of November, 1867, the bank served *Andrew* with a notice requiring him to pay all moneys due to the bank by the 2nd of December, and stating that in default of his so doing his shares would be forfeited. On the 28th of November he filed a declaration of insolvency, and on the following day was adjudicated bankrupt on the petition of the bank. On the 3rd of December the directors passed a resolution declaring his shares forfeited.

On the 20th of February, 1868, an order was made by the Commissioner directing the property comprised in the memorandum of the 2nd of August, 1866, and in the deed of the 27th of August, 1866, to be sold, and the proceeds to be paid to the creditors' assignee, who was to apply them, first, in payment of certain costs, and, in the next place, in or towards satisfaction of the debt to the banking company; and the banking company were to be at liberty to prove for the deficiency, if any; and the order was expressed to be without prejudice to the question of the right of the banking company to forfeit absolutely the bankrupt's shares.

The sales directed by the last-mentioned order were made, and the debt due to the bank was thus reduced to £6284 18*s.* 9*d.*, for which they now claimed to prove. The creditors' assignee objected that the value of the forfeited shares ought to be deducted, and, by an order made by the Registrar and confirmed by the Commissioner, the proof was admitted for £6284 18*s.* 9*d.*, less the value of the shares, the learned Commissioner being of opinion that the forfeiture was invalid by reason of the bankruptcy having intervened between the service of the notice and the time fixed for payment. The bank appealed from this order.

Mr. *Little*, Q.C. (Mr. *Bedwell* with him), having opened the case, was stopped by the Court.

Mr. *De Gex*, Q.C., and Mr. *North*, for the assignee:—

The clause of forfeiture in the deed of settlement gives a security on the shares; its frame is similar to that of a mortgage, and it is in the highest degree oppressive if not construed so, for otherwise

L. J. G. 1869 *Ex parte* RIPPON. *In re* ANDREW.

a shareholder might lose £10,000 worth of shares for not paying a debt of £500. The bank, therefore, are in the position of a creditor having a security who has realized his security, and can only prove for the balance.

[The LORD JUSTICE GIFFARD :—But the bank says *bonâ fide*, that it has not any security. If you can make out that the forfeiture is not absolute, you can recover the shares, but not in the Court of Bankruptcy.]

A secured creditor who proves must give up his security, he is not entitled to say that he will prove for the full amount at his own risk, and put the assignees to independent proceedings to get the property in the security.

SIR G. M. GIFFARD, L.J. :—

I do not think that the learned Commissioner was justified in the course he took as to these shares. The bank asserts that they are their absolute property, and if the assignees claim them they must take proceedings to assert their right. When parties who have in their possession property which formerly belonged to the bankrupt, but which they *bonâ fide* assert to be their own absolutely, come forward to prove a debt, stating that they hold no security, I think the Commissioner cannot take upon himself to decide whether the property does or does not belong to them, or determine that they shall not prove without putting a value on the property. The order I propose to make, is :—The bank insisting that they are owners of the shares, and admitting that they have no claim on them as mortgagees, or by way of lien, or otherwise than by reason of the forfeiture, let the proof be admitted, without prejudice to such rights, if any, as the assignees may assert in respect of the shares.

Solicitors : Messrs. *N. C. & C. Milne;* Mr. *E. Worthington.*

In re HUMBER IRONWORKS AND SHIPBUILDING COMPANY.

L. JJ.
1869
June 1.

WARRANT FINANCE COMPANY'S CASE.

Winding-up—Debts carrying Interest.

In the case of an insolvent company which is being wound up, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the winding-up, and it is only in the event of there being a surplus that they can have any claim for subsequent interest, in which case the dividends will be treated as applicable, first, in payment of interest, and then in reduction of principal.

THIS was a motion by way of appeal by the official liquidator of the *Humber Ironworks and Shipbuilding Company, Limited*, from a decision of the Master of the Rolls.

The order for winding up this company was made on the 13th of March, 1866. At the date of the order the company was indebted to the *Warrant Finance Company* in the sum of £25,000, which was to carry interest at £20 per cent. from a given day, which did not arrive until after the winding-up order. It was uncertain whether the funds applicable to payment of debts would be sufficient to pay the capital of the debts. In these circumstances the question as to the interest on the debt of the *Warrant Finance Company* became important, and was brought before the Master of the Rolls. A meeting of the Equity Judges was held to consider the point, but it being found that there was no uniformity in the practice, no resolution was come to. The Master of the Rolls then decided that, in respect of debts carrying interest, dividends should be declared on the sums due for principal and interest calculated up to the time of declaring the dividend, and that the dividend in respect of each such debt should be treated as applicable to the payment of principal and interest *pro ratâ*, and be attributed accordingly.

Mr. *Southgate*, Q.C., and Mr. *Wickens*, for the appeal motion :—

Dividends in the case of an insolvent company ought to be paid only on what is due for principal and interest at the date of the

L. JJ. 1869 WARRANT FINANCE COMPANY'S CASE.

winding-up. This is the rule in bankruptcy, and is the fair and proper rule in the case of an insolvent company. In the cases of *Re State Fire Insurance Company* (1), *In re Herefordshire Banking Company* (2), and *In re East of England Banking Company* (3), no question of insolvency arose. We do not dispute that, if there is a surplus, dividends must be applied, first, in payment of interest, and then in reducing the principal, as in the ordinary case where a debt carrying interest is paid by instalments.

Sir *R. Baggallay*, Q.C., and Mr. *Eddis*, for the *Warrant Finance Company*:—

We contend that the computation of interest should be carried on, and that dividends should be applied, first, in payment of interest, and then in reducing the principal. This is the rule in Chancery, and ought to be followed here: *Bower* v. *Marris* (4). Sect. 170 of the *Companies Act*, 1862, treats the rules of Chancery as applicable to winding-up proceedings, and the 74th rule of the Order of the 11th of November, 1862, is to the same effect. *Kellock's Case* (5) and *In re Xeres Wine Company* (6) shew that bankruptcy rules are not to be adopted in the winding up of companies.

Mr. *Westlake*, for other creditors.

Mr. *Southgate*, in reply:—

Sect. 170 of the Act merely relates to the mode of procedure. This is clear from *In re East of England Banking Company* (7), where the 26th rule of the General Order of the 11th of November, 1862, as to interest on simple contract debts, was held to be *ultrà vires*.

SIR C. J. SELWYN, L.J.:—

We have several times considered this case, for the Judges met together with the view, if possible, of laying down some general rule; but the result of that meeting was, that as there appeared

(1) 2 H. & M. 722.
(2) Law Rep. 4 Eq. 250.
(3) Ibid. 6 Eq. 368; 4 Ch. 14.
(4) Cr. & Ph. 351
(5) Law Rep. 3 Ch. 769.
(6) Ibid.
(7) Law Rep. 4 Ch. 14.

to be no uniform practice, no final decision was arrived at, it being thought more advisable to leave the matter to be decided in the ordinary course of judicial proceedings. It is surprising, that after the number of years during which winding-up proceedings have been going on in this Court, and considering that this question must have continually arisen, the point has never yet been, so far as I am aware, the subject of judicial decision. It now comes before us upon the recommendation of the Master of the Rolls, that we may decide, so far as the authority of this Court can decide, what is to be the rule applicable to such cases for the future. It is satisfactory, that in forming that decision we are not fettered by any rule which obliges us to depart from what appears to us to be the justice of the case. The case is, I think, unaffected by any previous decision; for the cases that were alluded to, *Kellock's Case* (1) and *In re Xeres Wine Company* (2), proceed upon an entirely different point, and the effect of the judgment in them was only this: that the right of a creditor having a mortgage-security to proceed upon all his remedies at once was not taken from him by any of the provisions of the *Companies Act.*

In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest. In the first place, it appears to me that we must consider the case under two aspects—first, where there is, and next where there is not, a surplus. I apprehend that in whatever manner the payments may have been made, whether originally they may have been made in respect of capital or in respect of interest, still, inasmuch as they have all been paid in process of law, and without any contract or agreement between the parties, the account must, in the event of there being an ultimate surplus, be taken as between the company and the creditors in the ordinary way; that is, in the manner pointed out in *Bower* v. *Marris* (3), by treating the dividends as ordinary payments on account, and applying each dividend, in the first place, to the payment of the interest due at the date of such dividend, and the surplus (if any) to the reduction of the principal. That disposes

(1) Law Rep. 3 Ch. 769. (2) Law Rep. 3 Ch. 769.
(3) Cr. & Ph. 351.

L. JJ. 1869

WARRANT FINANCE COMPANY'S CASE.

of the question where there is a surplus, as to which there is no doubt or difficulty.

There remains the question when the estate is insolvent. Now, it has been very properly admitted, on the part of the Appellant, that there can be no question as to any interest due at the time of the winding-up. Suppose, at the date of the winding-up there is a creditor having £1000 due to him for principal, and £100 due to him for interest. He would prove for £1100; and if a dividend of 10*s.* in the pound were declared, he would be entitled to receive £550, because his interest due at the date of the winding-up is just as much a debt as the principal. Suppose, at the same time, there was a creditor with a debt of £1000, which, like that of the Respondents in the present case, carried interest, but had no interest due upon it at the time, and a dividend of 10*s.* in the pound were paid, he would, in my judgment, receive £500. That would be obviously the case if the Court were able to do what it would wish to do, namely, to realize all the assets immediately, and distribute them amongst the creditors. It is very difficult to conceive a case in which the assets of a company could be thus immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date. Consequently, in the present case, this debt of £25,000, which had no interest due upon it at the date of the winding-up, should stand as a debt for that sum, and for no more; and the creditor should receive dividends on that sum and on nothing more; but of course I have already guarded myself from being supposed to say that the Court takes upon itself to alter the rights of the creditors to any further extent, or to deprive them of the right they have to interest at the full rate of £20 per cent. if and when there is a surplus to pay it. I think the

tree must lie as it falls; that it must be ascertained what are the debts as they exist at the date of the winding-up, and that all dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained. Of course, it will be understood that we are laying down this rule as applicable to all cases under the recent Act where creditors' actions are stayed.

SIR G. M. GIFFARD, L.J.:—

I think it quite clear that the 170th section of the *Companies Act* has no reference to the matter before us; nor can I consider that anything in *Kellock's Case* (1) affects the present question. The only argument really adduced in favour of computing interest subsequent to the winding-up is, that it has been the rule which has been adopted as to dead men's estates. For some reason or other dead men's estates have been assumed to be solvent, and they have been wound up on that footing; but so unjust has that been found, that it has been necessary to have a positive enactment to give interest from the date of the decree to simple contract creditors whose debts do not bear interest. I think, therefore, that the reason of the thing is rather against the rule which has been adopted as to dead men's estates than in favour of it. As to the rule which my learned brother has laid down, it is the rule in bankruptcy. That rule was, as has been said, Judge-made law; but it was made after great consideration, and no doubt because it works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.

For these reasons I am of opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up; for when the estate is insolvent this rule distributes the assets in the fairest way; and where the estate is solvent, it works with equal fairness, because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract; and, on the other hand, a creditor who has not stipulated for interest does not get it. I may add another

(1) Law Rep. 3 Ch. 769.

L. JJ. 1869 WARRANT FINANCE COMPANY'S CASE.

reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

Solicitors: Messrs. *Flux, Argles, & Rawlins;* Messrs. *Davidson, Carr, & Bannister;* Messrs. *Ashurst, Morris, & Co.*

L. JJ. 1869 *May* 28.

Ex parte ROSE. *In re* ROSE.

Bankruptcy—Jurisdiction of County Court—Affidavit that Debts do not exceed £300—*County Court Bankruptcy Orders*, 1863, *Rule* 46—*Bankruptcy Act*, 1861, *s.* 94.

Where a debtor petitions for adjudication of bankruptcy in the County Court it is not necessary that he should wait till he has ascertained with absolute certainty the amount of his debts; it is sufficient if he makes a *bonâ fide* estimate of their probable amount. And if the debts should turn out to exceed £300 the bankruptcy will not be annulled if he took reasonable pains to ascertain their true amount.

Therefore, where a debtor, under the advice of his solicitor, estimated the amount of a bill of costs to which he was liable at £55, and on taxation it proved to be £85, which brought the amount of his debts above £300, it was *held* that he was not wrong in not waiting for the taxation, and that the bankruptcy ought to be proceeded with in the County Court.

The decision of a County Court Judge annulling a bankruptcy under the 46th rule of the County Court Bankruptcy Orders, 1863, is subject to be reviewed by the Court of Appeal.

THIS was an appeal from an order of Mr. *Skinner*, the Judge of the County Court of *Staffordshire*, annulling the adjudication of bankruptcy of the Appellant *David Rose*.

The Appellant's wife was living separate from him with her father, Mr. *F. Yorke*, who brought an action against the Appellant for her maintenance. The action was tried on the 2nd of April, 1869, and a verdict was found for the Plaintiff for £225, being for maintenance calculated at 25*s.* a week. The Plaintiff applied for and obtained an order for immediate execution.

On the 5th of April the Appellant, fearing that he should be arrested, consulted his solicitors, who advised him to make himself bankrupt. They also informed him that the costs of the action

for which he was liable would amount to about £55; so that, adding a sum of £10 for maintenance of his wife since the action, his debt to the Plaintiff in the action, who was his only creditor, would amount to about £290, and therefore that the Petition ought to be filed in the County Court. He accordingly filed his Petition in the County Court at *Wolverhampton*, and filed an affidavit as required by the *Bankruptcy Act*, 1861, s. 94, that he verily believed that the debts justly due and proveable under the bankruptcy amounted in the whole to a sum not exceeding £300. He was adjudicated bankrupt upon this Petition. On the 13th of April the costs of the action were taxed for £85 6*s.* 8*d.*, and *Yorke* proved in the bankruptcy for the damages and costs, as taxed.

On the 10th of May the bankrupt attended to pass his final examination, when the Judge made an order annulling the adjudication on the ground that the debt and costs, together with the estimated sum for maintenance of his wife, amounted to more than £300, which brought the case beyond the jurisdiction of the County Court, and that he was not satisfied that the bankrupt had a *bonâ fide* belief that his debts did not exceed that sum (1).

In his judgment the Judge said that no one had a right to hazard his oath without ascertaining the fact with certainty, which the bankrupt could have done in this case by waiting until it came before the Master for taxing. He had not done this, but acted on the speculative opinion of his attorneys. Being satisfied that the debts exceeded £300, and not being satisfied that the bankrupt had, when he swore his affidavit, a reasonable and *bonâ fide* belief that his debts did not exceed £300, the Judge felt bound to annul the adjudication (2).

(1) The 46th Rule of the County Court Bankruptcy Orders, 1863, is as follows:—

"Where it appears that the debts of the bankrupt exceed in amount £300, the bankruptcy shall be proceeded with if the Judge is satisfied that the bankrupt had a reasonable and *bonâ fide* belief that such debts did not exceed in amount £300; but if he shall not be so satisfied, the adjudication shall be annulled."

(2) The notes of the learned Judge were produced on the appeal, and were as follows:—

"Mr. *Dale* swore that the bankrupt came to his solicitors' office, and asked them to file the Petition, and consulted them as to the amount of his debts. A verdict had been obtained for £225; his solicitors, from their experience, estimated the costs at £55; they did not await the taxation, but filed the

L. JJ. 1869 *Ex parte* Rose. *In re* Rose.

The bankrupt appealed from this decision, and asked that the Court would grant his order of discharge.

Mr. *Everitt*, for the Appellant:—

All that the 94th section of the *Bankruptcy Act*, 1861, requires is, that the debtor should swear that he "verily believes" that his debts do not exceed £300. It is quite impossible that a debtor should know the exact amount of his debts, for if any of the creditors have securities, he has to deduct the amount of the securities, and that must be only an estimate; for how can he know how much the securities will realize? *In re Harrison* (1) is an express authority in our favour. The debtor in this case acted perfectly *bonâ fide*. He took the advice of his solicitors, and they advised him to file his petition at once, lest the Plaintiff in the action should arrest him for the damages, which he might have done at any moment by abandoning the costs.

We also object that an application to annul the bankruptcy ought to have been made before the final examination: *In re Macaulay* (2).

Mr. *De Gex*, Q.C., and Mr. *Jelf*, for the creditor:—

This is not a proper case for appeal to this Court. As it has now been proved that the debts exceed £300, it would have been the duty of the Judge at once to annul the adjudication if it had not been for the 46th Rule of the Orders of 1863, which provides that the bankruptcy may proceed "if the Judge is satisfied the debtor had a reasonable and *bonâ fide* belief that his debts did not exceed in amount £300." It is not therefore a question which this Court can try; it depends upon the affirmative belief of the County Court Judge. If he is not satisfied, the case cannot proceed.

With respect to the merits, the debtor ought to have waited till

---

Petition at once to avoid the possibility of arrest. The Petition was filed on the 5th of April, two days after the verdict, for £225, for which speedy execution was granted. £10 was added as the allowance upon the jury's computation of £1 5*s.* a week, and upon that the solicitors prepared the affidavit of the bankrupt that his debts amounted to £290. The costs were taxed on April the 13th at £85 6*s.* 8*d.* (having been delivered at £108 19*s.*), making altogether £310 6*s.* 8*d.*, besides the £10 for maintenance."

(1) 1 H. & C. 819.

(2) 19 L. T. (N. S.) 266.

the taxation of the costs, which was only a week after the petition was filed. *In re Harrison* (1) was decided on the 101st section, and is not applicable.

SIR C. J. SELWYN, L.J.:—

I entertain no doubt that the bankrupt in this case has a right of appeal. There is, in my opinion, no foundation for the argument that the 46th Rule forms any exception to the right of appeal given in general terms by the 66th section of the Act. But this Court, while it acknowledges the right of appeal, does not fail at the same time to recognise the weight due to the discretion of a Judge, especially one so learned as the Judge by whom this order was made; nor do I forget that the Judge had the advantage of personally hearing the evidence of the bankrupt. But in this case the Judge has himself stated the facts on which he rested his opinion in the clearest manner; and we are bound to consider whether on those facts he was or not right in his conclusion.

It appears then that the damages in the action amounted to £225, and that the only other liabilities of the bankrupt were the costs and the allowance for his wife's support. How could he ascertain the amount except by the course which he took, namely, by reference to his solicitors? There is no suspicion that the solicitors made an improper or fraudulent calculation; that is negatived by the Judge's note which says: "His solicitors from their experience estimated the costs at £55." Why, then, should not the bankrupt be satisfied with this opinion, and why should he not swear to his *bonâ fide* belief? The real ground of the decision of the Judge was, that he thought the bankrupt ought to have waited for the taxation. He says, "No one has a right to hazard his oath without ascertaining the fact with certainty, which the bankrupt could have done in this case by waiting until it came before the Master for taxing." There I differ from the learned Judge. Whatever may be said of the expediency of the enactment, the law distinctly permits and requires the debtor to pledge his oath to the probable amount of his debts; and does not require him to wait till the exact amount is ascertained. In the present case it was in the power of the creditor to delay the taxation of the costs, although, in fact, he

(1) 1 H. & C. 819.

L. JJ. 1869 *Ex parte* Rose. *In re* Rose.

did not do so. This view is confirmed by the 97th section of the Act, which provides that the debtor shall deduct the value of property comprised in mortgage securities; for how could the debtor wait till all his mortgage securities were realized? And until that was done, the exact amount of the debt could not be ascertained. In my judgment, on the facts as they appear in the notes of the Judge, the debtor was entitled to file this petition in the County Court; and as we are of opinion that no difficulty arises in respect of the 46th rule, we think that the order of the County Court Judge must be discharged, and the bankruptcy must proceed. We cannot now give the bankrupt his discharge, but we will give protection for a month.

Sir G. M. Giffard, L.J.:—

I am clearly of opinion that the 46th rule does not interfere with the 66th section of the Act, and that the bankrupt has a right of appeal in this case. I am equally clear that the construction of sect. 94 is in accordance with the opinion of the Court in *In re Harrison* (1). It is clear that that section of the Act requires an estimate to be made of the probable amount of the debts. The only question is, whether the debtor had a *bonâ fide* belief of the truth of the estimate. In the present case the facts are very simple. The debtor consulted his solicitors, and it appears that their advice was given *bonâ fide*. I see no reason under these circumstances why he should have waited for the taxation. On the same principle, every debtor would have to wait till the actual amount of all his debts was ascertained, which would be most unreasonable. I think the Appellant had good ground for his belief, and that an order must be made as proposed by the Lord Justice.

Solicitors: Mr. *W. H. Duignan*; Messrs. *Doyle & Edwards*.

(1) 1 H. & C. 819.

In re CROMPE.

L. JJ.
1869
May 28, 31.

*Lunacy—Withdrawal of Demand for a Jury—*25 & 26 *Vict. c.* 86, *s.* 9—*Practice.*

Practice as to withdrawing demand for a jury on an inquiry as to insanity.

IN this case a Petition was presented for an inquiry as to the sanity of an alleged lunatic; and notice having been served on the alleged lunatic, she appeared at the hearing and demanded a jury. An order was accordingly made by the Lords Justices for an inquiry by a jury, and a day fixed by the Master for that purpose. Subsequently to the order, the solicitor for the Petitioner received notice from the solicitors for the alleged lunatic that she wished to withdraw her demand for a jury.

Mr. *Bovill*, for the Petitioner, accordingly applied to the Court to amend the order for inquiry, and to direct it to be made without a jury.

The alleged lunatic did not appear.

SIR C. J. SELWYN, L.J., said, that the alleged lunatic having demanded a jury the Court had no power to dispense with it, except under the 9th section of the *Lunacy Regulation Act*, 1862 (25 & 26 Vict. c. 86), which permitted the alleged lunatic to withdraw the demand "at such hearing, by himself, his counsel, or solicitor, orally." The Court could not, therefore, entertain the application in the absence of the alleged lunatic, but if she appeared, the present application might be treated as being made at the original hearing of the Petition.

SIR G. M. GIFFARD, L.J., concurred.

On a subsequent day Mr. *Bovill* again mentioned the matter.

Mr. *Bristowe* appeared for the alleged lunatic and withdrew the demand for a jury.

The LORDS JUSTICES discharged the original order, and made an order on the Petition for the usual inquiry before the Master.

Solicitors: Mr. *Soames*; Messrs. *Birch, Ingram, Harrison, & Co.*

L. JJ.
1869
June 8.

CATT *v.* TOURLE.

Covenant—Restraint of Trade—Negative Stipulation.

The Plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but the Plaintiff did not enter into any covenant to supply it. The Defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house which he supplied with his own beer. The Plaintiff filed his bill to restrain the Defendant from supplying beer, alleging that the Plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price:—

Held (affirming the order of *Stuart*, V.C., overruling a demurrer), that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual, and that, though it was in terms positive, it was in substance negative, and that the Court could interfere by injunction to restrain the Defendant from acting in contravention of it.

Observations on *Hills* v. *Croll* (1).

THIS was an appeal by the Defendant from an order of Vice-Chancellor *Stuart* overruling a demurrer.

The Plaintiff, a brewer at *Brighton*, sold certain land at *Brighton* to a land society, and conveyed it to the trustees, who covenanted that the Plaintiff, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in any house or other building which might be erected on the land, and which should be opened or used as an inn, public-house, or beershop.

The Defendant, who was a member of the society, acquired a portion of this land with notice of the covenant, and built upon it a public-house which, being a brewer, he supplied with his own beer, and, on being applied to by the Plaintiff, denied the Plaintiff's right to the exclusive supply of malt liquor.

The Plaintiff thereupon filed his bill for an injunction to restrain the Defendant from supplying beer to the public-house in question, alleging that he had been always ready and willing to supply the occupiers of the public-house with malt liquor of good quality, in requisite quantities, and at fair and reasonable prices.

(1) 2 Ph. 60.

The Defendant demurred to the bill for want of equity, and Vice-Chancellor *Stuart* overruled the demurrer. The Defendant appealed.

Mr. *Greene*, Q.C., and Mr. *Townsend*, for the Appellant:—

The covenant contains no negative stipulation; and even if it did, the matter is one in which the Court cannot interfere on account of the impossibility of trying the questions that would arise. *Collins* v. *Plumb* (1) is analogous, there being the same difficulty here; for if beer of good quality was not supplied, that would be a defence to any action on the covenant: *Holcombe* v. *Hewson* (2); *Thornton* v. *Sherratt* (3); and is the Court to try, on motion to commit, the question whether good beer has been supplied at a reasonable price? In *Hartley* v. *Pehall* (4) it was doubted whether a covenant of this kind would bind an assignee.

[The LORD JUSTICE SELWYN referred to *De Mattos* v. *Gibson* (5) and *Keates* v. *Lyon* (6), and the LORD JUSTICE GIFFARD to *Tulk* v. *Moxhay* (7).]

The covenant would be put an end to if the brewery establishment were removed: *Doe* v. *Reid* (8). The observations on brewers' leases in *Keppell* v. *Bailey* (9) are in our favour, and so is the decision in *Hills* v. *Croll* (10). The covenant is bad for want of mutuality, for the Plaintiff does not covenant to provide beer. There is no case in which a covenant of this nature has been enforced except as between landlord and tenant, and land cannot in this way be subjected to a new species of burden not connected with the use or enjoyment of it: *Sugden's* Vendors and Purchasers (11). Such a covenant as this is an unreasonable restraint of trade, and injurious to the public health.

Mr. *Karslake*, Q.C., and Mr. *Ayrton*, for the bill:—

There is here a negative stipulation in substance, though it is put in a positive form. The Court therefore can interfere: *Holmes*

(1) 16 Ves. 454.
(2) 2 Camp. 391.
(3) 8 Taunt. 529.
(4) 1 Peake, N. P. 178.
(5) 4 De G. & J. 276.
(6) Law Rep. 4 Ch. 218.
(7) 2 Ph. 774.
(8) 10 B. & C. 849.
(9) 2 My. & K. 517, 545.
(10) 2 Ph. 60.
(11) 14th Ed. p. 589.

L. JJ. 1869 CATT v. TOURLE.

v. *Eastern Counties Railway Company* (1); *Gale* v. *Reed* (2); *Great Northern Railway Company* v. *Manchester, &c., Railway Company* (3). As regards uncertainty, there is no analogy between this case and *Collins* v. *Plumb* (4); the covenant is perfectly plain: *Jones* v. *Edney* (5). Such a covenant as this is admitted to be good in a lease for a term of years, and, assuming that it is not good in perpetuity, there is no objection to it during *Catt's* life if he is so long a brewer, and ready to supply beer: *Mitchel* v. *Reynolds* (6). *Mann* v. *Stephens* (7) is in our favour on this branch of the case. The question as to mutuality is settled by *Lumley* v. *Wagner* (8), and the argument in *Keppell* v. *Bailey* (9), is disposed of by *Tulk* v. *Moxhay* (10). This is not an unreasonable restraint of trade, for it goes no further than is necessary to protect the vendor's interest: *Mitchel* v. *Reynolds*; *Avery* v. *Langford* (11), and cases there collected. *Dietrichsen* v. *Cabburn* (12) is in our favour.

Mr. *Townsend*, in reply.

SIR C. J. SELWYN, L.J., after shortly stating the case made by the bill, continued:—

In answer to that case many objections have been raised to the legality of this covenant, and to the jurisdiction of this Court to enforce such a covenant, or, at all events, to the propriety of the Court's interfering to grant the relief which is sought; and it has been said that even if the Plaintiff has any right, he ought to be left to assert that right in a Court of law. In the first place, I think it needless to consider the question which has been discussed, whether covenants of this nature run with the land. In *Tulk* v. *Moxhay* (13) Lord *Cottenham* says: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant,

(1) 3 K. & J. 675.
(2) 8 East, 80.
(3) 5 De G. & Sm. 138.
(4) 16 Ves. 454.
(5) 3 Camp. 285.
(6) 1 P. Wms. 181.
(7) 15 Sim. 377.
(8) 1 D. M. & G. 604.
(9) 2 My. & K. 517.
(10) 2 Ph. 774.
(11) Kay, 663.
(12) 2 Ph. 52.
(13) 2 Ph. 774, 778.

this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." So in the case of *Wilson* v. *Hart* (1), where the owner of a freehold house entered into a covenant with the Plaintiff, who was a previous owner, that the building should not be used as a beershop, and the house was afterwards let to the Defendant, a publican, as tenant from year to year, without express notice of the covenant, it was held, affirming the decision of the present Lord Chancellor, that although the covenant might not at law run with the land, the Defendant, having constructive notice of it, was bound by it in equity; and the late Lord Justice *Knight Bruce*, in the case of *De Mattos* v. *Gibson* (2), puts the matter as one of principle, not depending upon any such distinction. He says: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

Now, it appears to me that upon the statements in this bill the Defendant clearly purchased with notice of the present covenant, and that, therefore, assuming the covenant to be otherwise unobjectionable, he cannot be heard to say that he is now entitled to disregard its provisions.

The objections which have been raised to the covenant are, first, that it is void for uncertainty. This is a covenant entered into as a part of the transaction on the sale and purchase of a piece of land, and what the vendor stipulates for is that he shall have the exclusive right of supplying all ale, beer, and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beerhouse. That is a right which is capable of being abused, capable of being waived, capable of being lost, and if at any time, either in the progress of this suit or any

(1) Law Rep. 1 Ch. 463. (2) 4 De G. & J. 276, 282.

L. JJ. 1869 CATT v. TOURLE.

other time, it can be shewn that it has been so abused, so waived, or so lost, then there would be good ground for saying that this Court ought not to interfere in favour of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant. It might be said that it is too wide, that it is too general, but it appears to me to be impossible to say with any reasonable chance of success that it is in any degree uncertain. Then *Collins* v. *Plumb* (1) is cited as a clear authority for the proposition that a covenant of this kind is so uncertain that a Court of Equity will not enforce it. I entirely agree with the learned Vice-Chancellor that *Collins* v. *Plumb* does not in the least degree govern this case. The covenant there was not to sell or dispose of water from a well to the injury of the proprietors of the waterworks, their heirs, executors, administrators, and assigns, and Lord *Eldon* says: "I never met with such a covenant as this, upon which I must try in each instance whether the act of selling the specified quantity of water is a prejudice to the proprietors of these waterworks." He is there obviously referring to the very peculiar language of that particular covenant, which in express terms involved the question whether the sale was or was not to the prejudice of the proprietors of the waterworks, and therefore he said that a Court of Equity ought not to exercise its jurisdiction upon such a covenant. But this is not a covenant not to sell ale, beer, or porter to the prejudice of the Plaintiff; it is a covenant that he shall have the exclusive right of supplying all ale, beer, and porter consumed upon these premises. Therefore the question as to whether the sale is to his prejudice cannot be raised, because the extension of a man's trade is, of course, to his benefit, and the diminution of that trade must be to his prejudice.

Then it is said, secondly, that there is a want of mutuality; but what I have already said with respect to the nature of this covenant, and the right which is acquired thereby by the vendor, and the circumstances under which that right was acquired, has, I think, disposed of that objection. I go further and say, that even supposing it had been expressed in terms as a mere option, that so long and so often as the vendor chose to exercise a particular right,

(1) 16 Ves. 454.

that is the right of supplying all ale, beer, and porter, he should have that exclusive right, could it be said, because it was optional on his part, that therefore there was a want of mutuality, and therefore the covenant could not be enforced? I apprehend that the covenant being for valuable consideration, its being expressed to be conditional upon the exercise of a volition on the part of one side or the other, would not be any objection to its validity. I think, therefore, there is no objection on the ground of want of mutuality. Of course, a right so acquired is one which, like all other rights, must be reasonably exercised, and as Mr. *Greene* put it, if a man having a right to sell ale, beer, and porter were to sell some poisonous concoction which he chose to call ale, beer, or porter, that would not be a reasonable exercise of that right, neither would it be so if he were to sell good ale, beer, and porter at an unreasonable price.

Then the third objection that has been urged is, that this is an unreasonable restraint of trade. Now, in the first place, the rule laid down in the leading case of *Mitchel* v. *Reynolds* (1) is, that where the restraint is not general but partial, and is founded on valuable consideration, then it cannot be said to be an unreasonable restraint. But here it is said that the restraint is unreasonable because it is perpetual. I think the rule upon that subject has been well settled by authority, and, as I understand, the rule is this,—that a restraint preventing a person from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the nature of the trade. As an instance of such a covenant being upheld I may mention the case of *Wilson* v. *Hart* (2). And then with respect to this particular covenant, it seems to me that the Court cannot but take judicial notice of its being extremely common. Every Court of justice has had occasion to consider these brewers' covenants, and must be taken to be cognizant of the distinction between what are called free public-houses and brewers' public-houses which are subject to this very covenant. We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so extremely common as this is. I think there is no ground for

(1) 1 P. Wms. 181. (2) Law Rep. 1 Ch. 463.

L. JJ. 1869 CATT v. TOURLE.

the distinction which has been contended for, viz. that such a covenant might be good in a lease for 21, 50, or 100 years, but is not good if entered into as part of a transaction where the fee simple of a property is conveyed. I think, therefore, that none of the objections taken to the covenant can be sustained, especially at the present stage of this cause. At some future period of this cause, upon a motion, as in the case of *Hills* v. *Croll* (1), or at the hearing of the cause, circumstances may be shewn which render it improper for the Court to interfere—it may be shewn either that the Plaintiff has placed himself in such a situation that he ought not to be allowed to exercise his right, or that the Defendant had not notice of the covenant when he purchased the property, and then possibly *Hills* v. *Croll* may have some application, though, in my opinion, it is very difficult to reconcile that case with *Lumley* v. *Wagner* (2), which has been repeatedly followed, and if *Hills* v. *Croll* is to stand with that case at all it can only be upon its particular circumstances. What we have to deal with here is the general abstract question—whether a person purchasing with notice of such a covenant as this is to be bound by it, and upon that I can only say that I entirely agree with the conclusion at which the learned Vice-Chancellor has arrived, and I think this appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J. :—

The appeal in this case is from an order overruling a demurrer, and therefore the whole question to be decided is, whether upon the statements in the bill the Plaintiff is entitled to any relief. One thing at least is certain, viz., that if the Plaintiff cannot sustain a bill in this Court he is without remedy altogether, it being plain that this is a covenant which does not run with the land.

Then with respect to the allegations in the bill, the transaction is a simple one, it is a sale by the Plaintiff of land, and when he sold that land he stipulated for a particular covenant. The bill states that the Plaintiff was at the date of the sale, and has been, and still is, a brewer, carrying on a particular business at a particular place in *Brighton*, and it states that the Defendant had notice

(1) 2 Ph. 60. (2) 1 D. M. & G. 604.

of the covenant in question, and then it states this, which is very material, in the 14th paragraph of the bill, that "the Plaintiff in exercise of his exclusive right has always been, and now is, ready and willing, and previously to the institution of this suit has offered to the Defendant to supply to the orders from time to time of the Defendant, for consumption in the said *Duke of Edinburgh* beer-house, ale, beer, and porter, all of good quality, in requisite quantities, and at market, or fair and reasonable prices, as specified in the same offer;" and the terms of the covenant are, that "*Charles Catt*, his heirs and assigns, shall have the exclusive right of supplying all ale, beer, and porter which may be consumed in every house or other building which may be erected on any other part of the said piece of land, and which shall be opened or used as an inn, public-house, or beershop." Mr. *Catt* himself is Plaintiff, therefore we have nothing to do with what the state of things might be if he had assigned the deed, or had died, we have simply the question between Mr. *Catt*, the vendor, and this gentleman, who purchased the property with notice of the covenant in question. Now, with reference to that covenant it was said that the case was like *Collins* v. *Plumb* (1), which it certainly is not. In the case of *Collins* v. *Plumb*, the covenant was not to sell "to the injury of the Plaintiff," so that the covenantors might sell water as long as they did not injure the Plaintiff, and, therefore, on each occasion, as Lord *Eldon* said, it would have been necessary to try the question whether the sale was to the injury of the Plaintiff or not, but nothing of that description would be necessary here. We must assume the 14th paragraph of the bill to be true, and therefore it must be taken as admitted that there has been no breach of any kind on the part of the Plaintiff.

Then it is said that this covenant is uncertain, which it clearly is not. Nothing can well be more certain than that a man is to have the exclusive right of supplying a particular public-house with ale, beer, and porter. And again, it has been held in the case of *Holmes* v. *Eastern Counties Railway Company* (2), that a grant of an exclusive right of this description contained in a covenant is equivalent to a negative covenant. That being so, it brings the case in principle completely within the cases which have been decided on

(1) 16 Ves. 454. (2) 3 K. & J. 675.

L. JJ. 1869 CATT v. TOURLE.

negative covenants, the cases of *Rolfe* v. *Rolfe* (1), and *Lumley* v. v. *Wagner* (2). With respect to *Hills* v. *Croll* (3), that case, as was said by Lord *St. Leonards*, in his judgment in *Lumley* v. *Wagner*, was decided according to its particular circumstances. Unless it is to be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length, it is contrary to *Lumley* v. *Wagner*, and must be considered as overruled.

Lastly, with respect to this covenant being invalid by reason of its being in restraint of trade, it does not go beyond the ordinary brewer's covenant, except in this particular, viz., that the ordinary brewer's covenant is generally between lessor and lessee, or mortgagor and mortgagee, whereas the present covenant is between the vendor and purchaser of the fee. This difference does not make the covenant void.

Upon all these grounds I am of opinion that the demurrer was properly overruled in the Court below, that there is no ground for this appeal, and that it must be dismissed with costs.

Solicitors: Messrs. *Senior, Attree, & Johnson*; Mr. *H. Smith*.

L. JJ. 1869 *May* 28, 29; *June* 1.

In re SMITH, KNIGHT, & CO.

Ex parte GIBSON.

Debtor and Creditor—Novation of Debt.

S. & K. gave to *G.* promissory notes to secure moneys advanced by him to them to enable them to carry on the works of a railway for which they were contractors. The notes were payable at five years from the completion of the railway. The moneys advanced were carried to the credit of *S. & K.* in their banking account with *G. & Co.*, in which firm *G.* was a partner. The promissory notes were none of them given until after *S. & K.* had made over their business to a company, though some of the advances were made before. At the time when the notes were given, *G.* stated by letter that he looked to *S. & K.*, and knew nothing of the company in the matter. The

5 Ch. 127
9 Eq. 311,
5 Ch. 394
Aff'd 10 346

(1) 15 Sim. 88. (2) 1 D. M. & G. 604. (3) 2 Ph. 60.

company had the benefit of the advances. More than a year afterwards *G.* applied to the company for a year's interest, which the company paid, and at the same time sent to *G. & Co.* a cheque by *S. & K.* for the whole sum remaining to their credit, directing *G. & Co.* to place it to the credit of the company :—

Held (reversing the decision of the Master of the Rolls), that, having regard to *G.'s* express repudiation of the company as his debtors, the subsequent circumstances were not enough to make them such, and that he had no right of proof against the estate of the company when wound up.

THIS was an appeal by the liquidators of *Smith, Knight, & Co., Limited,* from a decision of the Master of the Rolls, allowing the Respondent, *G. S. Gibson,* as a creditor of the company for £5781 19*s.* due on certain promissory notes.

Smith & Knight were contractors for making the *Saffron Walden Railway. Gibson,* who was chairman of the railway company, and was also a partner in the banking firm of *Gibson & Co.,* agreed in February, 1864, to make advances to *Smith & Knight* to enable them to complete the works. These advances were to be secured by a deposit of shares in the above railway and by promissory notes. He accordingly advanced them various sums, which were carried to their credit in an account opened by them with *Gibson & Co.* The first advance was made on the 2nd of April, 1864, and on the 9th of November, 1864, the advances amounted to £5150, after which no further advances were made. For securing these sums *Smith & Knight* gave six promissory notes dated as follows: April 1, 1864, for £1500; July 9, 1864, for £750; August 13, 1864, for £750; September 16, 1864, for £850; October 7, 1864, for £800; and November 9, 1864, for £500. The sum secured by each note was made payable five years after the opening of the railway, with interest in the meantime at £5 per cent. per annum. None of these notes were made before August, 1864, though they bore the above-mentioned dates.

On the 8th of April, 1864, the company called *Smith, Knight, & Co., Limited,* was formed for purchasing the business of *Smith & Knight.* The terms on which the business was to be made over were embodied in a deed dated the 25th of April, 1864, by which *Smith & Knight* agreed to sell the leasehold premises occupied by them, and the goodwill of their business, and the benefit of all contracts entered into by them (including, by name, the *Saffron*

L. JJ. 1869 — *In re* SMITH, KNIGHT, & Co. — *Ex parte* GIBSON.

Walden Contract), to the company for £230,000, to be paid as therein mentioned. The company were to indemnify *Smith & Knight* from all claims under the contracts in respect of matters subsequent to the 1st of April, 1864, and *Smith & Knight* were to be entitled to all moneys payable for works done before that day. *Knight* was to be the managing director for seven years.

On the 12th of August, 1864, long after the company had commenced business, none of the promissory notes having yet been given, *Gibson* wrote to *Smith* the following letter:—

"In reference to the notes for the advances made, I suppose they will be drawn jointly and severally in the names of *Smith & Knight*, not by the company, as our arrangement was with you as individuals, and we know nothing of the company in the transaction. They should be made payable five years after date, or on demand, with an indorsement stating that they are not to be called for before the expiration of the five years. The first should be dated April 1, and the next July 1. There is also a third now required, as I see you have drawn for a further sum. They can be as well drawn at your office, and sent down signed. I am glad to hear that you are going to push forward the works, as it is very desirable to take advantage of the summer months."

The notes were accordingly given in the name of *Smith & Knight*, and, as has been stated, the advances secured by them were carried to the credit of *Smith & Knight*. The cheques drawn upon this account were all drawn in the name of *Smith & Knight*, and by the end of 1864 the balance was reduced to £195 12*s.* 7*d.* Interest on the loan was not entered in this account. It appeared that the moneys were applied for the works of the *Saffron Walden Railway*.

In November, 1865, *Gibson* or his firm applied by a letter (which was not produced) for payment of interest, then amounting to £306 15*s.* 11*d.* On the 10th of November a reply was sent to *Gibson* on behalf of the company, merely asking how the amount of £305 11*s.* 8*d.* for interest was made up. *Gibson & Co.*, on the 21st of November, answered as follows:—

"In reply to your letter addressed to our *G. S. Gibson*, who is from home, we beg to say that the interest due to the 1st of

October, 1865, is £306 15*s.* 11*d.*, and not £305 11*s.* 8*d.* The interest is calculated at £5 per cent., and income tax deducted. A remittance for the amount will oblige."

On the 26th of January, 1866, the secretary of the company sent to *Gibson & Co.* the following letter:—

"I am instructed to inform you that a cheque will be signed by the directors at their next finance meeting on the 14th proximo for the interest due, when the same shall be at once forwarded to you."

On the 22nd of February, 1866, the secretary of the company sent to *Gibson & Co.* a cheque for the interest, and also a cheque drawn by *Smith & Knight* for £195 12*s.* 7*d.*, the balance remaining to their credit. The cheques were enclosed in the following letter from the secretary:—

"Inclosed I hand you cheque for £306 15*s.* 11*d.*, being amount due for interest in connection with the loan on *Saffron Walden* shares. I also inclose a cheque for £195 12*s.* 7*d.*, which please place to the credit of an account to be opened in the name of this company, cancelling the account with Messrs. *Smith & Knight.*"

The balance of £195 12*s.* 7*d.* was accordingly carried to the credit of the company in a new account opened in their name, and the account of *Smith & Knight* with *Gibson & Co.* was closed.

No further payment of interest was made, and on the 30th of November, 1866, a resolution was passed for winding up the company voluntarily, and on the 18th of December, 1866, a supervision order was made.

In the above state of circumstances the Master of the Rolls decided that *Gibson* had adopted the company as his debtors, and was entitled to prove under the winding-up (1).

(1) 1869. April 27. LORD ROMILLY, M.R., after stating the facts of the case down to August, 1864, inclusive, continued:—

The question is, whether, after this, *Gibson* adopted the company as his debtors. It is quite clear that up to this time *Smith & Knight* were the debtors of *Gibson*, and that he had nothing to do with the company, whom he entirely repudiated as his debtors. Did what took place subsequently make them his debtors? For that purpose it is necessary to refer to the correspondence:—[His Lordship read the letters of the 10th of November, 1865, the

L. JJ
1869
In re SMITH, KNIGHT, & Co. *Ex parte* GIBSON.

Sir *R. Baggallay*, Q.C., and Mr. *Westlake*, for the liquidators in support of the appeal motion:—

There was no release of the old debtors here, and without that an undertaking by the new firm to pay the debt is a *nudum pactum*: *Liversidge* v. *Broadbent* (1); *Re Commercial Bank Corporation of India and the East* (2). There was, however, here no undertaking by the company with *Gibson* to pay; they paid him as agents for *Smith & Knight*.

Mr. *Jessel*, Q.C., and Mr. *Chitty*, for *Gibson*:—

Where the business of a trading concern is taken to by a new firm, and a creditor of the old firm applies to the new firm for payment and his claim is admitted, that is sufficient to make the new firm his debtors. In the case of the *Commercial Bank Corporation of India and the East* the present Lord Chancellor says, that if the creditor had known of the arrangement between the two firms there would have been a *novatio debiti*. That *Gibson* has

---

21st of November, 1865, the 26th of January, 1866, and the 22nd of February, 1866.] This last letter is very precise. The company tells *Gibson & Co.*, whatever might have been the case before, to alter the account, and open the account with the company. In answer to that letter *Gibson & Co.* say: "We beg to acknowledge the receipt of your cheque for £306 15*s.* 11*d.* in discharge of the interest due on our loan to the 30th of September, 1865. We have placed the cheque for £195 12*s.* 7*d.*, the balance of the account of *Smith & Knight*, to the account of the company as requested." It appears, accordingly, from a copy of the account in *Gibson's* books, which was admitted in evidence, that the account with *Smith & Knight* was closed on the 23rd of February, 1866, and that an account was opened with *Smith, Knight, & Co.* on the 27th of February, 1866. The company was not wound up until the November following; that is to say, eight or nine months afterwards. I am of opinion that *Gibson & Co.* thus adopted the company as their debtors. It is useless to go into the cases, because it is admitted that very small circumstances are sufficient to establish such adoption. I do not think that the acceptance of interest alone would have been sufficient after the repudiation contained in the letter of the 12th of August; but when *Gibson & Co.* are told to close the account of *Smith & Knight*, and open another with the company, and carry the balance to the account of the company, and they do so, it is impossible after that to say that the company was not their debtor, and that, therefore, they are not entitled to prove against the company. I think they gave up *Smith & Knight*, and adopted the company as their debtors, and that the claim, therefore, must be admitted.

(1) 4 H. & N. 603.
(2) 16 W. R. 958.

retained the promissory notes is not decisive against his claim. For it is not necessary that the old debtors should be released. Slight circumstances are sufficient to shew an adoption of the new firm as debtors: *Ex parte Williams* (1); *Ex parte Jackson* (2); *Winter* v. *Innes* (3); *Rolfe* v. *Flower* (4); *Ex parte Clowes* (5); *Hart* v. *Alexander* (6); *Ex parte Peele* (7); *Lindley* on Partnership (8).

Mr. *Westlake*, in reply:—

Receipt of interest is a trifling matter when the principal was not payable, and is not sufficient to prevail against the repudiation of the 12th of August, 1864. There was no consideration for the company giving their liability in addition to that of *Smith & Knight*.

SIR C. J. SELWYN, L.J.:—

In the case of the *Commercial Bank Corporation of India and the East* (9) I believe it was not the intention of the Lord Chancellor, as it certainly was not mine, to lay down any rule in opposition to any of the authorities which were cited to the Court. On the contrary, the Lord Chancellor referred to the case of *Rolfe* v. *Flower* as being a case which was put on a very sound foundation. I also accepted that case as a test by which the evidence might be tried, and I also referred to the observations of Vice-Chancellor *Wigram* in the case of *Benson* v. *Hadfield* (10), shewing that the time which has elapsed, and other circumstances, may be most material, and that entirely concurs with the substance of Lord *Cottenham's* judgment in *Winter* v. *Innes*. Several authorities have been cited in order to shew that in an ordinary case slight circumstances may be sufficient to prove the acceptance of a new firm as debtors. But that rule can only apply where those slight circumstances are not controlled by any express agreement or declaration. In applying those observations to the present case, and taking

(1) Buck. 13.
(2) 1 Ves. 131.
(3) 4 My. & Cr. 101.
(4) Law Rep. 1 P. C. 27.
(5) 2 Bro. C. C. 595.
(6) 2 M. & W. 484.
(7) 6 Ves. 602.
(8) Pages 440–454.
(9) 16 W. R. 958.
(10) 4 Hare, 32.

L. JJ. 1869 *In re* SMITH, KNIGHT, & CO. *Ex parte* GIBSON.

the test which is supplied by *Rolfe* v. *Flower* (1), I will assume in favour of the Respondents that the company took over all the assets and became subject to all the liabilities of the previous firm. It appears that Mr. *Gibson* was an original shareholder in that company, and the company appears from its memorandum to have been formed having for one of its objects to carry into effect an agreement for the transfer by *Smith & Knight* of their business, goodwill, and plant, including the lease held by them of the premises in *Great George Street*, and to execute the contracts comprised in the agreement. It appears that among the directors appointed were Mr. *Smith* and Mr. *Knight*, and that Mr. *Knight* was, by the articles of association, to be the managing director. It is obvious that *Gibson* being a shareholder in the company must be taken to have had not only constructive but actual knowledge of that transaction, which was the very foundation of the company, and the letter of the 12th of August, 1864, shews that at and before that date his attention had been pointedly called to the distinction between *Smith & Knight* as individuals and the new company which had been formed. He then, on the 12th of August, 1864, that is, four months after the company had been formed and after he had become a shareholder, writes to Mr. *Smith*, one of the two persons who had transferred their business to the company, this letter:—[His Lordship read the letter of the 12th of August, 1864.] This is a letter written some considerable time after the original agreement for the loan had been made, at a less but still at a considerable time after the formation of the company, and it plainly refers to the distinction existing between the former partnership of two, and the company. It is written with a full knowledge that all the business of the two had been transferred to, and was being carried on by, the company. But, notwithstanding that, it contains the express declaration, "we know nothing of the company in the transaction." There is no denial of that by the other parties to the original contract. In pursuance of that original contract, as enforced and explained by this letter, the promissory notes are given, not in the name of the company, or with any reference to the company, but in the names of *Smith & Knight*, and those notes so given are retained from that time down to the

(1) Law Rep. 1 P. C. 27.

present in the custody of Mr. *Gibson*. I admit that, notwithstanding all that, it was competent to the parties to enter into a new agreement and arrangement. But I cannot admit that, after such a declaration as that, slight circumstances would be sufficient to prove an entirely different arrangement. If this letter had been written before the company was formed, if it had been written at an earlier period, different considerations might have arisen. But having regard to the circumstances which had occurred before the date of this letter, and having regard to the position in which the parties stood at the time when the letter was written, and to the manner in which it was acted upon by both parties, I think very strong circumstances would be required to prove that an arrangement so entirely the opposite of the original one was subsequently come to. It is stated that the case need not be carried as far as that, and perhaps in that respect the Respondents may be considered to have weight in their argument. They say we do not insist upon the release of the obligation on the part of the two original parties to the contract, but we say there was an agreement by which the company became liable. The only circumstances, however, from which that can be inferred are, first, a demand which was made for interest; secondly, the payment of the interest; and thirdly, the transfer of the account which was made in the books of the company, though very slight reliance has been placed upon that.

First, with respect to the demand for interest, it must be remembered that the promissory notes were not yet due. One instalment of interest did become due, and the original letter demanding payment of that instalment has not been produced. On the one side it may be said that in the absence of any evidence it may be presumed that Mr. *Gibson* would continue of the same mind he was in on the 12th of August, when he said he would have nothing to do with the company, and that he made the application for interest as to the agent of the persons whom he treated as his debtors. On the other hand, it is justly said that the letter having been written by Mr. *Gibson* to Mr. *Smith*, it is rather for the company than for Mr. *Gibson* to produce that letter. No doubt it does appear that the letter was answered by the officers of the company, and the subsequent correspondence is with the company. There-

L. JJ. 1869. *In re* SMITH, KNIGHT, & Co. *Ex parte* GIBSON.

fore there is weight in that observation. One of the subsequent letters may be considered as an expression of a hope on the part of Mr. *Gibson* that the interest would be paid, that is a letter which is addressed to the company, and in pursuance of that the company pay the interest. Without deciding that, under ordinary circumstances, that demand (if it be a demand) and that payment of interest, would be sufficient, I think we must look at that payment of interest and that letter with the light derived from the letter of the 12th of August, 1864. I think that Mr. *Gibson* having told the company distinctly that he did not know them at all in the transaction, cannot be said to have assumed a different position as between himself and them, merely because the letter written by him was answered by the officer of the company in a letter containing an allusion to, and a promise to pay the interest, and because *Gibson* acquiesced in that, wrote a letter referring to that interest, and received the interest from the company. I think this is very properly described as a slight circumstance, and, in my judgment, entirely insufficient to outweigh the other matters to which I have referred.

What took place afterwards with respect to the accounts, is a circumstance upon which no great reliance can be placed. It appears that there was an account in the books of the bank with *Smith & Knight*. The interest did not enter into that account at all on one side or the other, and the explanation given is, that it was considered a separate transaction of Mr. *Gibson's*. That account shewed a balance of £195 12*s.* 7*d.*, for which a cheque was drawn, and a new account having been opened with *Smith, Knight & Co., Limited*, the £195 12*s.* 7*d.* was carried to the credit of that account. That is a transaction even more slight, I think, than the other, and one which may be safely disregarded in the consideration of the present case. Therefore, the conclusion at which, with great respect to his Lordship the Master of the Rolls, I arrive is, that, being bound, as we are, sitting in the position of a jury, to decide upon these facts, there being certain facts which appear to me to be clear and distinct, and on the other side certain matters which are in themselves equivocal, I cannot hesitate to say that, in my judgment, the plain and distinct declaration contained in the letter of the 12th of August, 1864, has not been qualified by any of the subsequent transactions; I think, therefore, that the order which

has been made by the Master of the Rolls must be reversed. I think the official liquidator, who has succeeded in this matter, should have his costs here, and in the Court below, out of the estate; but Mr. *Gibson* will not have any costs, or be called upon to pay any, either here or in the Court below.

SIR G. M. GIFFARD, L.J.:—

In cases of this description there is no difficulty whatever about the law. In each instance the matter is a matter of fact, and in this case the real question is, whether there was or was not a contract between Mr. *Gibson* and the limited company that the limited company should pay Mr. *Gibson* this debt. Of course to a contract both persons must be parties, and both parties must assent. As regards the cases which have been cited, there is no doubt whatever that if you have an old firm, and either a new partner is taken into it, or a new firm constituted, and the assets are taken over by that new firm, and the customer knowing all those circumstances, afterwards goes on and deals with the new firm, you infer from slight circumstances an assent on his part to accept the new firm as his debtors. That is not a doctrine that I dispute, nor do I dispute anything said by the present Lord Chancellor in *In re Commercial Bank Corporation of India and the East* (1). No doubt all his Lordship intended to say was, that the facts there did not come up to what was requisite in order to constitute Mr. *Jones* a creditor of the new firm, that two things at least were necessary, knowledge of the arrangement between the old and new firms, and assent on the part of Mr. *Jones*. Now here it is admitted that there is nothing in the sense of novation proper. It could not, in fact, be argued that the right to go against *Smith & Knight* individually had been given up. Therefore we start with that. Then we have the company formed in April and May, and the transaction in question completed in the month of August. The transaction is an agreement for a loan not to be called in for five years, a loan to *Smith & Knight*. The agreement was that promissory notes should be taken from them in respect of that loan, and those promissory notes were taken from *Smith & Knight*. Besides that, a letter was written by Mr. *Gibson* to Mr. *Smith*, in which he says, "In

(1) 16 W. R. 958.

L. JJ.
1869
In re SMITH, KNIGHT, & Co. *Ex parte* GIBSON.

reference to the notes for the advances made, I suppose they will be drawn jointly and severally in the names of *Smith & Knight*, not by the company, as our arrangement was with you as individuals, and we know nothing of the company in the transaction." There can be nothing, I think, more explicit than that, and this being the origin of the transaction, the knowledge of the arrangement between *Smith & Knight* and the company does not appear to me to be material, unless you can make out that there was some intention to vary the original agreement. Then what happens afterwards? The advances are made to *Smith & Knight*, and placed in the bank in which *Gibson* was a partner to the credit of *Smith & Knight*. One payment of interest is made, and that by the limited company. The application for the payment of that interest was made to the limited company. Nothing more than that happened up to the time of the winding-up, except the transfer of the balance, which I will mention presently. The Master of the Rolls says, that at the outset of the transaction it was not intended that the limited company should be liable. He says, further, that he did not consider that the mere payment of interest would render the limited company liable. He seems to have based his judgment upon the fact of the £195 12*s.* 7*d.* being transferred from the account of *Smith & Knight* with the bank in which Mr. *Gibson* was a partner, into the account of *Smith, Knight & Co., Limited*. But when you come to investigate the transaction, it amounts to nothing more than this:—*Smith & Knight* drew a cheque upon their banking account. That cheque is accompanied by a letter from the limited company, in which they ask that that sum should be transferred to the account of the limited company, and that the account of *Smith & Knight* should be closed. That was the whole of the transaction, and in argument it was admitted, very properly, that that could not alter the liability. There is, after every fact is known, a distinct arrangement in which the liability of the company is altogether repudiated. There is nothing but an application for interest, and interest paid by the limited company carrying on the business of *Smith & Knight*, carrying on that business in the very offices of *Smith & Knight*, and being, in point of fact, the very persons to whom *Smith & Knight* would refer anyone for the payment of interest. I cannot infer, nor do I think any jury could, from the mere payment of interest, infer either an offer on the part of the company to give further security to Mr. *Gibson*, and

still less any agreement by Mr. *Gibson* to accept that further security. The whole matter comes to this, that as between Mr. *Gibson* and the limited company there was no contract, and there being no contract there can be no proof by him against the company.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *Aldridge & Thorn.*

HOFFMANN *v.* POSTILL.

Interrogatories by Defendant—Patent Suit—Exceptions—Practice.

In answering interrogatories filed by a Defendant for the examination of the Plaintiff, the general rule applies that he who is bound to answer must answer fully.

Interrogatories for the examination of a Plaintiff are on a different footing from those for the examination of a Defendant in this respect, that a Plaintiff is not entitled to discovery of the Defendant's case, but a Defendant may ask any questions tending to destroy the Plaintiff's claim.

In determining whether a question is one of fact, and, therefore, to be answered, it makes no difference that it is asked with reference to a written document.

A Defendant in a suit for infringement of a patent, in order to prove that there was no novelty in the Plaintiff's patent, interrogated the Plaintiff as to the inventions described in the specifications of previous patents, and asked him to shew in what respect they differed from his. The Plaintiff declined to answer these interrogatories on the ground that the questions were not questions of fact, and that they related to the Plaintiff's case; the Defendant excepted to the answer, and the exceptions were allowed.

A Plaintiff in a patent suit was required by interrogatories to set out a correspondence between himself and a third party, and also to state the particulars of the infringement of his patent on which he relied. He refused to answer these questions on the ground that the Defendant might obtain an order in Chambers to inspect the correspondence; and that he had sufficiently set out the particulars of the infringement in his bill.

Held, that these answers were sufficient.

Questions respecting proceedings in a foreign Court relating to infringements of the Plaintiff's patent, *held* to be immaterial.

The order of *James*, V.C., varied.

An exception bad in part is not necessarily to be overruled.

Higginson v. *Blockley* (1) disapproved of.

THIS was an appeal from an order of Vice-Chancellor *James* overruling certain exceptions to the answers of the Plaintiffs to interrogatories exhibited by the Defendant.

(1) 1 Jur. (N.S.) 1104.

L. JJ.
1869
HOFFMANN
v.
POSTILL.

The bill was filed by *Frederick Edward Hoffmann* and others, the owners of a patent which was granted to *Alfred Vincent Newton* on the 22nd of December, 1859, for "An improved construction of kilns and ovens for burning bricks, tiles, limestone, and other substances."

The Plaintiffs had also taken out a fresh patent on the 24th of June, 1864, for "Improvements in kilns or ovens for burning bricks, tiles, pottery-ware, limestone, cement, and other substances."

The Defendant, *Francis Postill*, was a brick manufacturer at *Scarborough*, and had erected a brick kiln in the neighbourhood of that town, in which, as the Plaintiffs alleged, he had adopted some of the improvements patented by the Plaintiffs, thereby infringing their patent. The Plaintiffs accordingly filed the present bill against him, praying that he might be restrained from using the improvements patented by the Plaintiffs, and might account to them for all profits made by burning any substances in any kiln in which those improvements were used.

The 25th and six following paragraphs of the bill contained a full description of the construction of the Defendant's kiln, pointing out the particulars in which it infringed the Plaintiffs' patent.

The Defendant having answered the bill, filed a concise statement and interrogatories for the examination of the Plaintiffs. In the concise statement he alleged that his kiln was constructed upon the principle of a patent taken out by Mr. *T. M. Gisborne*, and was no infringement of the Plaintiffs' patent; that the alleged improvements patented by the Plaintiffs were not new; and that they were not distinctly explained in the specifications.

The interrogatories filed were very voluminous, the object of those respecting which the principal argument arose being to obtain admissions by the Plaintiffs that their improvements were substantially identical with improvements which had been described in the specifications of previous patents taken out by other persons.

In the 1st interrogatory they were asked whether in the year 1841 one *Joseph Gibbs* did not obtain letters patent for an invention described as "A new combination of materials for making bricks, tiles, pottery, and other useful articles, and a machine or

machinery for making the same, and also a new mode or process of burning the same, which machine or machinery and mode or process of burning are also applicable to the making and burning of other descriptions of bricks, tiles, and pottery." The Plaintiffs were then interrogated as to the details of the improvements described in *Gibbs'* specification, with a view to shew that his process was substantially the same as theirs; and were required to point out the difference between his improvements and those which were comprised in the Plaintiffs' patent.

In several subsequent interrogatories the Plaintiffs were asked similar questions respecting patents taken out by other persons previously to those under which the Plaintiffs claimed.

Extracts from these interrogatories, shewing the form of the questions asked, are given in the judgment of the Lord Justice *Selwyn.*

In the 11th interrogatory the Plaintiffs were questioned respecting proceedings taken by them in the Kingdom of *Saxony* against persons infringing their patent in that country, in which the Plaintiffs were alleged to have been unsuccessful.

In the 12th interrogatory the Plaintiffs were required to set forth a correspondence between them and Mr. *T. M. Gisborne,* respecting the patent granted to *A. V. Newton.*

In the 14th the Plaintiffs were required to set forth full and descriptive particulars of the alleged infringements of which they complained.

The Plaintiffs put in an answer to these interrogatories. They admitted the granting of the patents to the persons mentioned in the interrogatories, but denied in each case that the improvements were substantially the same as those included in their own patents; and as to the rest of the inquiries in each case they objected to answer them in the following terms: "We are advised that the remainder of the discovery sought by this interrogatory relates exclusively to our case against the Defendant in this suit, or relates to matters of law, and that the Defendant is not entitled to any discovery from us in this our answer respecting the same, and we submit to the judgment of this Honourable Court that we are not bound further to answer this interrogatory."

They objected to answer the 11th interrogatory on similar

L. JJ. 1869 HOFFMANN v. POSTILL.

grounds, and also because "it was irrelevant to the matters in question in the present suit."

With respect to the correspondence asked for in the 12th interrogatory, they submitted that the discovery sought for might more conveniently be obtained by means of an application in Chambers upon the affidavit of the Plaintiffs, and, therefore, to avoid expense, declined to answer the interrogatory.

As to the particulars sought for by the 14th interrogatory, they said that "the particulars of the said infringements are fully and, as we submit, sufficiently set forth in the original and amended bill filed in this cause."

The Defendant filed twelve exceptions to this answer.

The important exceptions were the first six, which related to the answers to the interrogatories as to the previous patents; the 7th, which related to the answers to the 11th interrogatory as to the proceedings in *Saxony;* the 9th, which related to the answer to the 12th interrogatory, as to the correspondence between the Plaintiffs and Mr. *Gisborne*; and the 12th, which related to the answer to the 14th interrogatory, respecting the particulars of alleged infringements.

The Vice-Chancellor overruled all the exceptions, and the Defendant appealed from his decision.

Mr. *Webster*, Q.C., Mr. *Kay*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Beetham*, for the Defendant:—

The interrogatories may appear voluminous, but if fairly answered they will save expense, because the examination of witnesses will be in great measure saved. This applies to the interrogatories respecting the acts of infringement and the correspondence. The defence made by the Defendants to the Plaintiffs' charges is, that there is no novelty in the Plaintiffs' patent, and the Defendant is entitled to prove this by the Plaintiffs' own admissions: *Renard* v. *Levinstein* (1). The Plaintiffs object to answer, on the ground that the questions relate, not to matters of fact, but to what appears on the specifications; but the nature and effect of previous inventions, and the difference between the Plaintiffs' processes and those described in the specifications are

(1) 11 L. T. (N.S.) 79.

matters of fact to which the Plaintiffs must pledge their oath, although for explanation it is necessary to refer to the written documents: *Hill* v. *Evans* (1).

The counsel for the Plaintiffs were not called upon with respect to the 7th and 9th exceptions.

Mr. *Grove*, Q.C., Mr. *Aston*, and Mr. *Lawson*, for the Plaintiffs:—

If a Plaintiff in a patent suit is to be obliged to answer interrogatories of this nature, the time occupied in such suits, and the consequent expense, will be enormously increased. With respect to the interrogatories in the present case as to the previous patents, we contend, in the first place, that the Defendant has no right to ask for discovery from us as to the previous use of the invention, for the purpose of impeaching our title: *Daw* v. *Eley* (2). That case is identical with ours, except that the interrogatories were exhibited by the Plaintiff instead of by the Defendant. Secondly, the Defendant calls on us to answer as to matters which are not matters of fact, but inferences from documents. It is the province of the Court to put a construction upon the specifications, and to draw conclusions from them: *Neilson* v. *Harford* (3). The documents in this case are not even in evidence. The Defendant says, in effect, "If I put in evidence these specifications, what is your answer to them? How do you distinguish the inventions described in them from yours?"

The exceptions are also wrong in point of form, for they include parts of the interrogatories which we have answered; and if the answer is sufficient as to some of the questions included in an exception, the exception must be overruled: *Higginson* v. *Blockley* (4).

Mr. *Webster*, in reply.

SIR C. J. SELWYN, L.J.:—

I trust that our decision in this case will not be productive of such disastrous results with respect to the expense of patent suits

(1) 31 L. J. (Ch.) 457; 4 D. F. & J. 288.
(2) 2 H. & M. 725.
(3) 1 Webst. Pat. Ca. 331, 370.
(4) 1 Jur. (N.S.) 1104.

L. JJ. 1869 HOFFMANN v. POSTIL

as those which have been anticipated by Mr. *Grove* in his argument, because I think that the protection, and the only protection, which the Court can successfully extend to a suitor in cases like this, is by a careful and diligent exercise, by the Judge, at the hearing of the cause, of the power which is vested in him of dealing with the costs of these proceedings. Our decision in this case will leave it entirely within the power of the learned Vice-Chancellor to order that all the costs occasioned by these interrogatories, the answer, the exceptions, the hearing of the exceptions before him, and the hearing of this appeal, shall be dealt with as he in his discretion shall think fit; and if it shall appear that the power which the Court, for the purpose of justice and discovery, gives to the parties to administer interrogatories to each other has been abused, I have no doubt the learned Vice-Chancellor will take care that justice shall be done, and will make the party who is to blame pay all the costs of the improper exercise of this power.

On the other hand it must be borne in mind that it is almost impossible for the Court, at this stage of the proceedings, to determine what propositions will be material to the case of one or other of the parties. A certain latitude must always be allowed in seeking discovery, and, accordingly, we have examined these exceptions with reference to the general rule that the person who is bound to answer must answer fully.

With respect to many of the interrogatories, and, I think, even many of the exceptions, in this case, it appears to me perfectly obvious that they never could produce any good result to the Defendant, by whom they are filed. Take, for instance, the 7th exception, which relates to certain legal proceedings which have taken place in a foreign country. It seems to me preposterous to suppose that the Plaintiffs ought to be called upon to answer, or that their answering that question could be any benefit to any one. I think that exception must clearly be overruled.

So, also, with respect to the 9th exception, which requires them to set forth at full length certain correspondence. The forms of the Court do not require Plaintiffs to do anything of the kind. I think, therefore that exception must be overruled.

With respect to the 10th exception, assuming that the Defendant had a right to ask the Plaintiffs to set forth "the full and

descriptive particulars of the alleged infringement or infringements of the said letters patent," upon which it is unnecessary to express any opinion, I think that that has been completely answered by the 19th paragraph of the answer, where the Plaintiffs say: "The particulars of the infringements are fully and, as we submit, sufficiently set forth in the original and amended bills filed in this cause." They there adopt, in substance, and upon oath repeat the particulars of the infringement as they are stated in the amended bill. I think that is a sufficient answer, and therefore the 10th exception must be overruled.

But with respect to the others, I think the fallacy of the argument which has been addressed to us is apparent, because it depends mainly upon these two propositions. First, that wherever there is a question relating to a matter of fact, and that question is so stated as to refer to any of the subject matters of a specification or other written document, there the Plaintiffs are not bound to answer, or in other words, that it ceases to be a question of fact because it refers to a written document. I think that is erroneous, and that the question is not the less one of fact because, in mentioning the subject matter of the question, the person administering the interrogatory refers to the specification, or some written document. The second proposition consists in this, and it is continually repeated in this answer, namely, that the discovery sought relates exclusively to the case made by the Plaintiffs against the Defendant in this suit. If it could be shewn that it was not material to the case of the Defendant, then, of course, that would be a good objection to the interrogatory; but, in truth, in a case of this description the case of the Defendant is, that the Plaintiffs' patent is invalid, and everything that is material to shew that, is part of the Defendant's case, and he is entitled to discovery as to all the matters of fact which are or may be material to his case.

Applying those observations to these exceptions, taking, for instance, one of the questions referred to in the 1st exception, namely, "Are not these sliding doors colourable variations of, or a mechanical equivalent for, the divisions or walls with openings between each compartment in the kiln?" it may be perfectly true that those sliding doors are referred to or mentioned in some specification or other written document, but it is not the less a question of fact.

L. JJ. 1869 HOFFMANN v. STILL.

It is, in my judgment, a question of fact whether they are mechanical equivalents for the other contrivance which is there mentioned. That being so, I think the Defendant was entitled to an answer to that question.

So, also, with respect to the 3rd exception, on which considerable reliance was placed. The question, it is true, is mixed up with other inquiries, but there is a separate and distinct question: "Is not the said *William Basford* the inventor of the process of supplying fuel from the top or roof of the kilns?" If I were asked as to my belief whether the answer to that question will ultimately turn out to be of any advantage whatever to the Defendant, I should be bound to answer in the negative. My belief is that it will not, but if I am asked as a matter of equity whether that is a question of fact which the Plaintiffs are bound to answer, I am equally bound to say that it is.

It is unnecessary to go through all these exceptions at length, for they all depend on the same principle. I will only take one other as an instance, namely, the 5th interrogatory, "Is there not, therefore, in this arrangement a continual reciprocal action of the kilns or oven? Is there not a costless, gradual warming of the materials to be burnt, &c.?" It is quite true that the word "therefore," as used in that sentence, does connect the question with what is mentioned in the specification; but it is, nevertheless, a question of fact, and a question which, in my judgment, the Plaintiffs are bound to answer. I think, therefore, this exception must be allowed, as well as all the others which depend upon the same principle.

The order, therefore, of this Court will be, that the Vice-Chancellor's order be discharged, except so far as it overrules the 7th, 9th, and 10th exceptions, and that all the exceptions will be allowed except the 7th, 9th, and 10th; but we shall reserve all the costs of the exceptions before the Vice-Chancellor, and the costs of this hearing, to be dealt with by the Vice-Chancellor as he shall think fit at the hearing of the cause.

SIR G. M. GIFFARD, L.J.:—

I quite agree with the Vice-Chancellor in this case to the extent of overruling the 7th, 9th, and 10th exceptions; the 7th excep-

tion because it refers to proceedings which, to my mind, in themselves are quite irrelevant; the 9th, because it asks that the correspondence shall be set forth in terms; and the 10th, because the particulars have been already set forth by the Plaintiffs.

But with respect to the other exceptions, I cannot accede to the principle which was laid down by Vice-Chancellor *Kindersley* in *Higginson* v. *Blockley* (1), that because an exception is bad in part, therefore it is bad in the whole. I think the exceptions as to the other interrogatories must be allowed, because there are some parts of them, unquestionably, which deal with matters of fact, and with matters of fact which are material to the Defendant's case.

As regards the case of *Daw* v. *Eley* (2), it must be always remembered that that was the case of a Plaintiff exhibiting interrogatories to a Defendant, and it was there held that the Plaintiff could not call on the Defendant to set forth the particulars of his defence. But when you come to the case of a Defendant asking questions of a Plaintiff, it is a very different thing. It is the Defendant's business to destroy the Plaintiff's case, and there the Defendant has a right to ask all questions which are fairly calculated to shew that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement.

Again, with reference to a great majority of the arguments which have been urged in this case, it is enough to say that it is almost impossible where you have antecedent publications in a book, or antecedent patents which are alleged to destroy the novelty of the succeeding patent, whether it be in examining the parties by interrogatories, or in examining witnesses, to avoid the necessity of referring to those documents, and asking a variety of questions respecting them, some of which are more proper for the Court; but many of which are absolutely essential in order to enable the Court to come to a proper conclusion as to the legal effect of the different specifications.

Under these circumstances, therefore, I think that the order which we now make, leaving the costs in the hands of the Vice-Chancellor, will do justice between the parties. At the same time,

(1) 1 Jur. (N.S.) 1104. (2) 2 H. & M. 725.

L. JJ. 1869 HOFFMANN v. POSTILL.

I cannot part with these interrogatories without saying that they are needlessly long, needlessly vexatious, and in a form which I hope never to see again.

Solicitor for the Plaintiffs: Mr. *J. H. Johnson.*
Solicitor for the Defendant: Mr. *J. G. Waugh.*

L. JJ. 1869 *April* 24.

In re LONDON AND NORTHERN INSURANCE CORPORATION.

STACE AND WORTH'S CASE.

Contributory—Companies—Agreement for Amalgamation void—Director.

By the articles of association of a company the directors were to be elected by the shareholders, and power was given to purchase the business of any other company. Power was also given by any extraordinary meeting of the company to amalgamate with any other company. An agreement was made for the amalgamation of this company with another company on the terms that the second-named company should sell their assets to the first-named company; that the directors of the amalgamated board should consist of the present five directors of the purchasing company, and of seven of the directors of the selling company. This agreement was acted upon, but was never confirmed by an extraordinary meeting of the purchasing company:—

Held (affirming the decision of *James*, V.C.), that this agreement was void, and that two of the directors of the selling company, who had been allotted shares in the purchasing company in exchange for shares in the selling company and had acted as directors of the amalgamated company, were not liable to be put on the list of contributories to the purchasing company.

THIS was an appeal from an order of the Vice-Chancellor *James*, directing the list of contributories to the *London and Northern Insurance Corporation*, to be varied by omitting the names of Colonel *Stace* and Mr. *Worth*.

The *London and Northern Insurance Corporation* was a company carrying on business under articles of association which nominated directors who were to act until the first meeting of the shareholders, and contained provisions for the election of directors by the shareholders after the first meeting had been held; the articles also contained the following clauses:—

78. The directors may also at any time, or from time to time,

take over or purchase the whole or any part of the business and assets of any other company or society, either for a consideration in money to be paid or received, or by the issue of shares.

133. If at any time it shall be thought expedient that the *Company* shall be dissolved or amalgamated with any other company, or its business, estate, and effects disposed of to any other company, it shall be lawful for an extraordinary meeting to declare that such dissolution or amalgamation of the *Company*, or disposition of the business, estate, and effects thereof, shall take, and the same shall take, place accordingly, upon such terms and conditions as such extraordinary meeting shall determine or approve.

In 1867 negotiations were entered into by the *London and Northern Insurance Corporation* for the purchase or amalgamation of another company, called the *Life, Investment, Mortgage, and Insurance Company*, and on the 21st of August, 1867, an agreement was made between the two companies by which it was agreed that from and after the 15th of September, 1867, the companies should be amalgamated and form one under the style and title of the *London and Northern Insurance Corporation*, and under and subject to the terms and conditions of the articles of association of the *Corporation* as then existing; and that for the furtherance and carrying out of the aforesaid amalgamation the *Investment Company* did thereby agree to sell, transfer, and assign unto the *Corporation* all their books, goods, chattels, premiums, income, investments, bills, loans, and all and every book debt, agents' balances, capital in arrear and owing, and other assets, for and in consideration of, and subject to, the terms and conditions thereinafter contained, and the *Corporation* agreed to purchase and accept a transfer of the same accordingly. It was also agreed that the *Corporation* should issue shares in exchange for those of the *Investment Company* in manner following: *i. e.*, shares fully paid up and without further liability of £5 each would be given to every holder of fifty shares or upwards in the *Company* upon which £2 per share had been paid, for the amount and to the extent only of his existing interest in the *Company*, viz., at the rate of two shares of £5 each in the *Corporation* for every five shares in the *Company* of £2 each. It was also provided—that from the date thereof the *London and Northern Corporation* should become answerable for all claims upon

L. JJ. 1869 STACE AND WORTH'S CASE

policies in the *Investment Company*, and also for all debts, claims, annuities, and other liabilities of the *Company;* that the chairman of the *Corporation* should continue to be chairman of the amalgamated board, and that the deputy chairman be chosen from the directors of the *Company*, should they desire it; that the directors of the amalgamated board should consist of the present five directors of the *Corporation* and of seven of the directors of the *Company* to be selected by themselves. Compensation was provided for the manager of the *Company* (who was to retire), and also an annuity for his life, secured on the joint funds of the amalgamated company. It was also provided, that immediately after the signing of the agreement the directors of the *Investment Company* should take the necessary steps, as provided by the articles of association, for duly confirming the same; that on the completion of the amalgamation a meeting of the shareholders of the amalgamated company should be called to confirm the same; that on the completion of the transfer of the business of the *Company* to the *Corporation* and the discharge of its liabilities, the same should be dissolved, and finally wound up voluntarily at the expense of the *Corporation*, and, finally, that in the event of the directors of the *Company* not securing the necessary consent of their shareholders the agreement was to be null and void, and of none effect whatsoever, and the *Corporation* thereby agreed to release them from all the provisions thereof.

This agreement was confirmed by the *Investment Company* but had never been confirmed by an extraordinary meeting of the *London and Northern Corporation*, nor was it registered with the Registrar of Joint Stock Companies, nor did it appear that the meeting of the shareholders in the amalgamated company had been called.

On the 12th of September, 1867, Colonel *Stace* and Mr. *Worth*, and five other directors of the *Life Investment Company*, were appointed directors of the *London and Northern Insurance Corporation*, and it was alleged that certificates for shares in that *Corporation* were received and accepted by them in exchange for their shares in the *Investment Company*. There was some contradiction as to this alleged acceptance of shares, but it appeared that both Colonel *Stace* and Mr. *Worth* had attended meetings of the *Cor-*

poration and had signed policies and taken part in the proceedings as directors between the 15th of September, 1867, and the 31st of May, 1868.

In June, 1868, a resolution was passed for voluntarily winding up the *Corporation*, and the names of Colonel *Stace* and Mr. *Worth* were placed on the list of contributories.

In consequence of the omission to register the agreement under which Colonel *Stace* and Mr. *Worth* took their shares, they would have been liable to pay the amount in full under 30 & 31 Vict. c. 131, s. 25. An application was therefore made before Vice-Chancellor *James* to have their names removed from the list, and the Vice-Chancellor, after hearing the case twice argued before him, removed their names accordingly (1).

(1) March 16, 1869.

SIR W. M. JAMES, V.C. :—

I had, when this matter was before me on a former occasion, arrived at the conclusion that I could relieve these gentlemen from what would certainly have been a very hard position if, by the operation of a recent Act (30 & 31 Vict. c. 131), they were to be held liable for these shares and were compelled to pay up the whole amount. But I afterwards thought, in considering the matter, that I had not sufficiently attended to the effect of the 78th clause of the articles of association of the *London and Northern Insurance Corporation*. It occurred to me that possibly this agreement, purporting to be an agreement between the *Investment Company* on the one side, and the *London and Northern Corporation* on the other side, might be sustained on the ground that the amalgamation had been, in fact, confirmed by the one society, and that it might be affirmed as a purchase by the other. But when I come to look at the terms of the agreement, it seems quite clear to me that this was never intended to be, and never was, a purchase merely, or a purchase in fact under clause 78. It was intended to be, and was expressed to be, an amalgamation of the two companies, and the sale and purchase was only part of that amalgamation, and part of the machinery by which, in fact, the two companies were to be constituted into one company — an amalgamated company with an amalgamated board of directors. The clause, in fact, which refers to the sale and purchase of the property, is that the one agrees to sell, and the other agrees to purchase, in consideration of, and subject to, the terms and conditions thereinafter contained; and amongst those terms and conditions are several which are far beyond the scope of a mere purchase by the one society of the other, and could not have any legal validity unless by an amalgamation sanctioned by the *London and Northern Corporation*. It is only necessary to point to that which is the most important one of all, I think, viz., that the direction of the amalgamated board shall consist of the present directors of the *London and Northern Corporation*, and of seven of the directors of the *Investment Company*, to be selected by themselves: that is to say, there was to be an entire change in the constitution of the company, a thing which

L. JJ. 1869 STACE AND WORTH'S CASE.

The official liquidator appealed.

Mr. *Amphlett*, Q.C., and Mr. *Higgins*, for the Appellant:—

The directors of the original *London and Northern Corporation* had power, under Art. 78 of their articles of association, to

---

was quite beyond the powers of the directors to stipulate for. That clause seems to be of itself sufficient to make this agreement void, or at least to make it what it really was in fact, a provisional agreement, which was only to take effect when it had been duly confirmed. There is another important clause in this agreement, which is, that on the completion of the amalgamation a meeting of the shareholders of the amalgamated company shall be called to confirm the same. It is certainly not very easy to give a meaning to every word of that clause, because it is difficult to conceive how a thing completed could afterwards be confirmed; but it is quite obvious that it was intended that this agreement should be in some manner confirmed by the shareholders of both companies. Therefore it was a provisional amalgamation, subject to—and, in fact, it could not be otherwise than subject to — confirmation by the shareholders of the *London and Northern Insurance Corporation*, either at a separate meeting by themselves, or at that amalgamated meeting which it was intended to call. The agreement, therefore, was, in my opinion, absolutely void.

It is, however, contended that, notwithstanding the agreement itself was *ultrà vires* and void, yet there are personal acts, or things personally affecting these two gentlemen, which render them still liable as shareholders of the company, notwithstanding the invalidity of the agreement. First, it is said that there was an exchange of shares, that is to say, that they sent in their certificates of shares (at least, one of them did), and obtained certificates of shares in exchange for them. I am of opinion that there was no authority on the part of the directors of the *London and Northern Corporation*, or any person whatever, to make that exchange, or to give them these shares in exchange for those which they were giving up. It was void, therefore, and was merely the exchange of a piece of paper, which had no validity whatever, for shares which, in truth, they were really not getting rid of by the transaction.

It is then said that their names appear on the register of shareholders. When, where, by whom, or under what authority their names were inserted in that book does not appear. I am of opinion that no one ever had any authority whatever to make out that list of shareholders which was intended to be a list of shareholders of the amalgamated company, and that the transfer of names from the one company to the list of the other was as inoperative in point of law as if some one had got hold of the book and transcribed into it the names of the members of the House of Lords or Commons. Then it is said that these gentlemen sat as directors. There is not the slightest pretence for saying that they ever became directors of the *London and Northern Corporation*, properly so called. They were provisionally, under the agreement, directors of the amalgamated company, and my opinion is, that they never sat otherwise than as under the amalgamation, which was void, and as members of an amalgamated board of an amalga-

purchase the business of any other company, or to amalgamate with any other company, and to make all necessary arrangements for that purpose. They have done nothing which was beyond their powers. *Levita's Case* (1), *Imperial Bank of China* v. *Bank of Hindustan* (2), *Clinch* v. *Financial Corporation* (3), and *Alabaster's Case* (4), all fall far short of this. It is necessary that, if a sale or amalgamation is contemplated, the directors should have absolute power to make all the necessary arrangements; for if the matter was brought before the shareholders before completion, and then was broken off, it might be very injurious to the company. Even if the directors had no power, the agreement was only voidable, and not void. The clause as to a meeting to confirm what was completed is absurd, and the Court will endeavour to give a reasonable construction to the agreement, which would be that the details as to compensation to the directors and secretary were to be settled at that meeting. At all events, these gentlemen were directors of the *Company* before and after the amalgamation, and have held themselves out to the world as shareholders in the amalgamated company: *Oakes* v. *Turquand* (5).

Mr. *Kay*, Q.C., and Mr. *Bagshawe*, for the Respondents, were not called upon.

SIR C. J. SELWYN, L.J., after stating the principal provisions of the articles of association of the *London and Northern Insurance Corporation*, said that these articles vested the power of appointing the directors, after the first set of directors went out of office, in

---

mated company, both the board and company having only a provisional existence. I am of opinion, therefore, that that is also utterly void and utterly inoperative. It appears to me, therefore, that this was a void agreement, with a void acting upon it, a void recognition and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix these gentlemen on the list of shareholders. My former decision was, in my opinion, right, and the names of these gentlemen must be removed from the list, with costs out of the estate.

(1) Law Rep. 3 Ch. 36.
(2) Ibid. 6 Eq. 91.
(3) Ibid. 4 Ch. 117.
(4) Ibid. 7 Eq. 273.
(5) Ibid. 2 H. L. 325.

L. JJ. 1869

STACE AND WORTH'S CASE.

the shareholders, and gave no power whatever to the directors to do what had been done in this case, and to give the other company, in fact, the power of appointing a majority of the board. The result of the agreement of the 21st of August, 1867, was that the directors of the *London and Northern Corporation*, who had no power to take away the management of the company from their shareholders, had, by this amalgamation or purchase, allowed the governing body to be so constituted that the majority should be nominees of the *Investment Company*. This was clearly *ultrà vires* as to the directors of the *London and Northern Corporation*, and it was not a collateral arrangement, but of the very substance of the agreement. The whole agreement was beyond the powers of, at least, one of the parties to it, and consequently it was wholly void. In fact, the parties seemed to have had a notion that this agreement would not be valid, for one of the provisions was that it should be confirmed by a meeting of the amalgamated company, and it was clear that without confirmation the agreement was illegal.

There remained the question, whether there had been any separate and independent agreement between the shareholders and Colonel *Stace* and Mr. *Worth* rendering them now liable as contributories of the *Company*. Fully paid-up shares were, it was said, allotted to them in exchange for their shares in the *Investment Company*, and their names were entered on the register as holders of the shares—all which acts were said to have been done in pursuance of this agreement, which was void. It was also said that these gentlemen attended several meetings of the amalgamated company, and acted as directors of the *London and Northern Corporation*, and in that capacity signed policies. All those acts were, however, done in conformity with, and in pursuance of, this void transaction; and there was no evidence of any separate agreement on the part of Colonel *Stace* and Mr. *Worth*. No doubt there might be an independent agreement, as in the case of *Clinch* v. *Financial Corporation* (1), which might render them liable, but there was no evidence of it here. The case of *Oakes* v. *Turquand* (2) had no reference to this case if the Court was right in holding the agreement void, for it could not be said that these

(1) Law Rep. 4 Ch. 117. (2) Law Rep. 2 H. L. 325.

gentlemen were ever in a position in which they could have enforced an agreement to have shares as against the *Corporation*. It was therefore clear that they could not now be included in the list of contributories. It was fortunate that no creditor could have been deceived; for even if he had inspected the list of shareholders, he would have seen that the shares held by Colonel *Stace* and Mr. *Worth* had been issued as fully paid-up shares. The decision of the Vice-Chancellor was right, and the appeal must be refused with costs.

SIR G. M. GIFFARD, L.J., said that the first question was, whether the agreement of August, 1867, was void or not. Under the articles of association the directors of the *London and Northern Corporation* had power to purchase the business of another company; but they assumed to do much more than that; among other things, they agreed that the majority of the directors of the amalgamated company should be selected by themselves out of the directors of the *Investment Company*. This part of the agreement was not separable from the rest, but was of its very essence, and it was a material alteration of the constitution of the *London and Northern Corporation*, being nothing less than giving to the *Investment Company* the power of appointing a majority of the board of the amalgamated company. The agreement was, therefore, void, and not merely voidable.

The next question was, whether, notwithstanding this, Colonel *Stace* and Mr. *Worth* had, by their acts, rendered themselves liable to be placed on the list of contributories. In support of this view it was urged that their names had been entered on the register, and that they had acted as directors of the company. No one, however, of those acts constituted a contract as between them and the company, and there was nothing to constitute such a contract except the agreement of the 21st of August, 1867, which must be taken to be void. *Levita's Case* (1) had been cited, but in that case there had been an independent application for shares by *Levita*, and he was taken to be concluded from saying that he was not a shareholder. Then the case of *Imperial Bank of China* v. *Bank of Hindustan* (2) was referred to, but all that his Lordship

(1) Law Rep. 3 Ch. 36. (2) Law Rep. 6 Eq. 91.

L. JJ. 1869 STACE AND WORTH'S CASE.

had said there was, that though a large majority of the shareholders had bound themselves, that was not enough to bind the dissentients if the bargain was beyond the powers of the company.

Then, in order to make out an independent contract, it was said that the names of these gentlemen were placed upon the register as holders of fully paid-up shares, and that they had signed their names to several documents as directors. But no one of these acts amounted to a contract between them and the company if the agreement was void. The result was, that *Alabaster's Case* (1) went quite the length of this case, for there was never a time when the *Corporation* could have said that these gentlemen were shareholders in the *Corporation*, and when these gentlemen could have claimed to be shareholders. The decision of the Court below must be affirmed, and the appeal dismissed with costs.

Solicitor for the Appellant: Mr. *F. W. Snell.*
Solicitor for the Respondents Mr. *J. Townley.*

L. JJ. 1869 *May* 7.

Ex parte OSENTON. *In re* PRIOR.

Bankruptcy—Application for leave to issue Execution notwithstanding Creditors' Deed—Delay in impeaching Deed—Proceedings at Law.

A creditor obtained judgment against his debtor on the 1st of August, 1868. On the same day the debtor executed a deed of composition with his creditors whereby he assigned all his property to a trustee by way of security for payment of the composition. The deed was registered under the 192nd section of the *Bankruptcy Act*, 1861. The creditor refused to assent to the deed, and proceeded to sue out execution; but the sheriff interpleaded, and the issue was tried between the creditor and the trustee of the deed. The Court of Exchequer decided, on the 23rd of January, 1869, that the deed was invalid as a trust deed under the 192nd section of the *Bankruptcy Act*, 1861, as the requisite number of assents had not been obtained; but that it operated at law as an assignment of the debtor's property to the trustee, and, consequently, that the issue must be decided against the creditor. The creditor accordingly, without further delay, proceeded to examine the debtor

(1) Law Rep. 7 Eq. 273.

in bankruptcy in order to impeach the deed, and on the 6th of April applied under the 198th section of the *Bankruptcy Act* for leave to issue execution notwithstanding the deed:—

Held, that as the creditor had throughout the proceedings at law insisted on the invalidity of the deed, he had been guilty of no delay in not sooner impeaching the deed in bankruptcy, and his application was granted.

THIS was an appeal from a decision of Mr. Commissioner *Bacon*.

On the 29th of July, 1868, the Appellant, *G. Osenton*, obtained a verdict at the *Surrey* Assizes against *S. T. Prior* for £194 8*s*., with interest and costs. On the 1st of August, 1868, *Prior* executed a composition deed of that date, whereby he covenanted to pay his creditors a composition of 2*s*. in the pound on the 29th of October then next, and by the same deed assigned all his estate and effects to one *Johnson* by way of security for payment of the composition. The principal creditors of *Prior* were the *Writhlington Coal Company*, the *Frome Permanent Building Society*, the executors of the late *W. Rabbits*, and Messrs. *Cruttwell & Daniel*. The assents of these creditors were given to the deed on the 1st of August by Messrs. *Prior & Bigg* as agents for *Cruttwell & Daniel*, who assented on behalf of themselves and the other three creditors, but without prejudice to their rights under a former trust deed which had been executed by the debtor a short time previously, and without prejudice to the securities held by any of the other creditors. The validity of these assents was disputed, and without them the requisite number had not been obtained.

The deed was registered under the 192nd section of the *Bankruptcy Act*, 1861, on the 3rd of August, 1868, and notice of it was, on the same day, given to *Osenton's* attorney. The latter, however, proceeded to sign judgment against *Prior*, and issued a *fi. fa.* against his goods; but the sheriff on receiving notice from the trustee of the composition deed interpleaded, and the issue between the trustee and *Osenton* was tried before the Court of Exchequer on the 3rd of November, 1868. A verdict was taken for the Plaintiff, the trustee of the deed, with leave to the Defendant *Osenton* to move for a new trial.

The rule was argued before the Court of Exchequer on the 23rd of January, 1869 (1), when the Judges were of opinion that

(1) *Johnson* v. *Osenton*, Law Rep. 4 Ex. 107.

L. JJ. 1869 *Ex parte* OSENTON. *In re* PRIOR.

the assent of the above-named creditors not being absolute and unqualified was void; and, consequently, that the deed could not operate as a trust deed under the 192nd section of the *Bankruptcy Act*, 1861; but they also held that the property in the goods passed under it to the trustee, and therefore that the verdict was right. The rule was accordingly discharged.

Osenton then applied to the Court of Bankruptcy for leave to examine the debtor for the purpose of proving the invalidity of the deed. Notice of the application was dated on the 11th of February, but was not served till the 22nd, and the examination took place on the 25th of February and the 9th of March, 1869. The examination shewed that the deed had not been properly assented to. On the 6th of April *Osenton* served notice of application to the Court of Bankruptcy for leave to issue execution notwithstanding the deed. The application was adjourned till the 22nd of April, when the learned Commissioner dismissed it on the ground of delay on the part of the applicant. From this decision *Osenton* appealed.

Mr. *Ince*, for the Appellant:—

There can be no doubt after the judgment of the Court of Exchequer and the examination of the bankrupt that the deed of the 3rd of August, 1868, cannot stand as a trust deed under the 192nd section. This is not a case where any extraordinary interference like an injunction is asked for; for the only remedy which is open to the Appellant is in this Court. The only question, therefore, is, whether the Appellant has debarred himself of his right to make the application by his own conduct. He has shewn no laches, but has been following up his common law proceedings diligently; and although he did not before the 11th of February, 1869, give notice of an application in the Court of Bankruptcy, yet the proceedings in the Common Law Courts were a sufficient assertion of his rights, and simultaneous proceedings in bankruptcy would have only been vexatious. In this respect the case differs from the cases relied on by the other side, in all of which the creditor had lain by or been guilty of delay in asserting his rights.

[He referred to *Ex parte Banfield* (1); *Ex parte Savin* (2); *Ex*

(1) Law Rep. 1 Ch. 154. (2) Law Rep. 1 Ch. 616.

parte Davis and Denton (1); *Ex parte Anon.* (2); *Maughan* v. *Vinesberg* (3).]

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the debtor:—

Our first objection to this appeal is, that it is on a matter which is purely one of discretion, and the Court of Appeal will not in general interfere in such a case. But, independently of that consideration, the Appellant has no ground for this application. If the deed is invalid, he does not need the leave of this Court to sue out execution; if it is good, the granting of leave is a matter of discretion, and is only granted to a person who comes promptly to this Court for relief: *Ex parte Banfield* (4); *In re Sullivan* (5). The latter case shews that the rule of the Court does not depend upon the fact that the deed is simply a composition deed, and not an assignment of estate, as here. The only difference between *Ex parte Banfield* and the present case is, that in that case there was a delay of eleven months, here there has been a delay of eight months since the registration of the deed.

[With respect to the effect of the qualified assent of the creditors, they referred to *Ex parte Roots* (6).]

Mr. *E. Lloyd*, for the trustee.

SIR C. J. SELWYN, L.J.:—

The first question in this case is one of general importance, and it is whether, where a debtor has made the affidavit required by the 192nd section of the *Bankruptcy Act*, 1861, and thereby obtained the registration of the deed of assignment, and where it afterwards appears that the affidavit was not true, a creditor is entitled to come to this Court, under the 198th section of the *Bankruptcy Act*, 1861, and obtain leave to issue execution notwithstanding the deed. I think there is no doubt that he is so entitled. He is clearly impeded in his proceedings at law by the registration thus improperly obtained of such a deed, and he is entitled to come to the Court of Bankruptcy to have this impediment removed. In

(1) Law Rep. 2 Ch. 363.
(2) 19 L. T. (N.S.) 73.
(3) Law Rep. 3 C. P. 318.
(4) Law Rep. 1 Ch. 154.
(5) 36 L. J. (Bkcy.) 1.
(6) Law Rep. 2 Ch. 559.

L. JJ. 1869 *Ex parte* OSENTON. *In re* PRIOR.

the present case I think that, having regard to the proceedings in the Court of Exchequer, and to the unsatisfactory and contradictory statements of the debtor in his examination, it is clear that the requisite number of creditors did not assent to the deed. The only other question, therefore, is, whether there has been any such delay on the part of the creditor as to displace the right which he would otherwise have had. It is said that he lay by for several months; but this was not the case, for he followed up his action, and sued out execution on his judgment on the 3rd of August, 1868. It is also said that he elected afterwards to proceed in a Court of Law, but he was driven to that course by the sheriff, who exercised his right of issuing an interpleader summons. This proceeding went on till the judgment of the Court of Exchequer in *Johnson* v. *Osenton* (1). In my judgment, if, while disputing the deed and insisting on the validity of his execution, he had also come to this Court, he would have been taking vexatious and improper proceedings.

It is clear there was no delay till January, 1869. After that there was only the unexplained delay between the 11th of February and the 22nd of February, 1869, when he served notice to examine the debtor. The examination took place on the 25th of February, and again on the 9th of March, when the statements made by the bankrupt were very unsatisfactory, and on the 6th of April the creditor served notice of application to the Court for leave to issue execution, on which the order was made which is now appealed from.

The learned Commissioner's judgment is entitled to great weight, and no doubt this is a question which is very much a matter for the discretion of the Judge; but in this case the learned Commissioner was influenced by decisions cited before him, but which do not appear to us to be applicable. The case of *Ex parte Banfield* (2) was very different. In that case there was no such continuous opposition to the deed as in the present; there had been a delay of eleven months. The Lord Chancellor there says: "Not only has there been long delay on the part of this creditor, but the effect of the deed is to give the creditors in general the full benefit which they might have derived under the bankruptcy."

(1) Law Rep. 4 Ex. 107. (2) Law Rep. 1 Ch. 154, 157.

In the present case instead of eleven months there was only a delay of eleven days. Again, in *In re Sullivan* (1) there was a delay of eighteen months. In *Ex parte Savin* (2) the Lord Justice *Turner* says:—"With that knowledge he rests till the 31st of May, allowing the proceedings under the deed to go on during the whole of that period, eight weeks at least, without, according to the evidence before us, having given any intimation of his intention to dispute the deed or to question anything that was done under it, and, even according to the statements made in his behalf at the Bar, the most that can be said is, that he did, three weeks before the 31st of May, intimate to the solicitor on the other side that he intended to question the deed." In the present case, so far from not shewing any intention to question the deed, the Appellant had disputed it continually. The Lord Justice proceeds to say:—"Now in a transaction of this description, relating to concerns of the enormous extent of those which are involved in this deed, I think it is not going too far to say that it was the duty of this applicant, at all events, either to go to the Court of Bankruptcy at once to make the application which he ultimately made on the 31st of May, or, at all events, to give notice of his intention to do so." I have already said that in the present case it was not the Appellant's duty to apply to the Bankruptcy Court while the proceedings at law were pending. If he had done so, it would have been a vexatious proceeding.

In *Ex parte Davis and Denton* (3) Lord Justice *Turner* says:—"From the close of the vacation till the 31st of October nothing was done to shew that the Petitioner intended to dispute these mortgages. In the meantime the proceedings under the bankruptcy had been going on, and the bankrupts had become entitled to apply for their order of discharge, which has been suspended to the present time by the steps taken by the Petitioner." It is sufficient to read this passage to shew how entirely different that case was from the present. Here the creditor has from the first insisted on his right to issue execution, and he now asks that he may be treated as not being bound by the deed; he says that he was no party to it and that the Judges of the Court of Exchequer have decided that it

(1) 36 L. J. (Bkcy.) 1. (2) Law Rep. 1 Ch. 622.
(3) Law Rep. 2 Ch. 367.

L. JJ. 1869 *Ex parte* OSENTON. *In re* PRIOR.

was not assented to by the requisite number of creditors, and is therefore not binding upon non-assenting creditors; and he therefore now asks for an order under the Act for leave to issue execution. I think that such leave should be given; but there will be no costs of the appeal.

SIR G. M. GIFFARD, L.J.:—

This application is rendered necessary by the registration of the deed which was obtained by mis-statements in the affidavit. There can be no doubt that the application is such a one as ought to be granted, unless the creditor has debarred himself by his own conduct. Each of these cases must depend on its own circumstances, and I have no hesitation in saying that the present case is not affected by any of the authorities cited. I think there was no delay on the part of the creditor. He obtained judgment in his action, and execution issued; the writ was in the hands of the sheriff, and it was this deed which was the only impediment in his way. In this state of things no other course could be pursued than that which he did pursue. It was said that these proceedings were only between the Appellant and the trustee of the deed, but the debtor and every one else must have known that the Appellant was disputing the validity of the deed. This was the state of circumstances up to the 23rd of January. Since that time there seems to me to have been no delay. In one respect, the case differs from most of the other cases which have been referred to, namely, that although there was an assignment to *Johnson* it was only for the purposes of security, and was not acted upon. No one could have supposed that the Appellant considered himself bound by the deed; nor did he do, or abstain from doing, anything which could deceive anybody. Under these circumstances I agree that leave ought to be given to the Appellant, and I cannot part with the case without saying that I think the conduct of the debtor very reprehensible.

Solicitors for the Appellant: Messrs. *H. C. Nisbet & Co.*
Solicitor for the Respondent: Mr. *W. H. Bishop.*

TAYLOR *v.* DOWLEN.

L. JJ.
1869
May 26.

Practice—Appeal for Costs—Costs of Trustees.

An order that trustees shall pay the costs of a suit personally forms no exception to the general rule that no appeal will be allowed for costs.

THE bill in this case was filed by the assignees of *Charles Elstone*, a bankrupt, against the trustees of the will of *J. Windebank*, to obtain the assignment of certain leasehold premises, and the payment of certain moneys in their hands. The bill also prayed that the Defendants might pay the costs of the suit.

The trustees put in an answer, and the cause came to a hearing on motion for decree before Vice-Chancellor *Malins* on the 2nd of March, 1869, when His Honour directed the Defendants to convey the leaseholds, and to pay the sums of money to the Plaintiffs, and ordered the Defendants to pay the costs up to and including the hearing. The Defendants appealed from so much of the decree as ordered the costs to be paid by them.

On the appeal being opened, the Plaintiffs objected that the appeal being simply for costs could not be heard.

Mr. *Cookson*, for the Appellants:—

The rule that no appeal can be brought for costs alone is subject to exceptions, which are stated by Lord *Cottenham* in *Angell* v. *Davis* (1). It is true that in one respect he modified his opinion, for in *Lancashire* v. *Lancashire* (2) he held that the mere fact of the bill expressly praying costs against a Defendant would not justify an appeal on the ground of costs. But his judgment is still an authority that where the costs are directed to be paid out of a particular fund, the party entitled to the fund may appeal for the purpose of getting the costs paid by the other party personally. The same was held in *Jenour* v. *Jenour* (3). That being so, the converse ought also to be allowed, namely, that where a trustee has been ordered to pay costs personally, he should have liberty to appeal for the purpose of throwing the costs upon the trust fund.

(1) 4 My. & Cr. 360. (2) 2 Ph. 657. (3) 10 Ves. 562.

L. JJ. 1869 TAYLOR v. DOWLEN.

This is the rule laid down in *Daniell's* Chancery Practice (1), where an unreported case of *Bagot* v. *Bagot* is cited, in which such an appeal by trustees was allowed. The trustees would otherwise be at a disadvantage; for if the decree was in their favour it could be appealed against, but if against them they would have no remedy.

Mr. *Glasse*, Q.C., and Mr. *Hastings*, for the Plaintiffs, were not called on.

SIR C. J. SELWYN, L.J.:—

In this case the Petition of appeal has at least the merit of being candidly worded, for it only professes to appeal against the decree so far as it orders the costs to be paid by the Defendants. It is therefore for the Appellants to shew that it comes within one of the exceptions which have been allowed to the general rule that no appeal can be brought for costs. Those exceptions are thus stated by Lord *Cottenham* in *Angell* v. *Davis* (2): where the costs are part of the relief specifically prayed by the bill; where they are not personal costs, but are given out of the fund; and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary in determining the question to enter into any investigation of the merits.

In the subsequent case of *Lancashire* v. *Lancashire* (3), the same learned Judge decided that the first point afforded no ground for exception. The conflict of those two cases was brought to the attention of the present Lord Chancellor, when Vice-Chancellor, in *Umpleby* v. *Waveney Valley Railway Company* (4), where His Lordship agreed with the decree in *Lancashire* v. *Lancashire*, so that that point may be considered as disposed of. As to another exception, namely, where the facts distinctly appear upon the face of the proceedings, so that the question can be decided without going into the merits, it must be taken to refer to cases where there is some inconsistency in the decree, as there was in *Angell* v. *Davis*, where the costs of a trustee who had committed a breach of trust were given out of the trust fund. Here there is no such inconsistency;

(1) 4th Edit. p. 1349.
(2) 4 My. & Cr. 366.
(3) 2 Ph. 657.
(4) 1 J. & H. 254.

nor could the question be determined without going into the merits, for it entirely depends upon the question whether it was justified by the conduct of the trustees. The only other exception is, where the costs are ordered to come out of a particular fund. There is no such case here. The only authority relied on was the case of *Bagot* v. *Bagot*, cited in *Daniell's* Chancery Practice (1). But in that case, as stated by Mr. *Daniell*, it is clear that the appeal was not confined to the question of costs, but included the substantial point in dispute, so that the trustees had a *locus standi*, and the Court had, so to speak, possession of the appeal (2).

I think, therefore, that there is no ground for the proposition contended for by the Appellants. If it were carried out to its full extent, it would follow that in all cases where a trustee or creditor was ordered to pay costs personally, he would be able to appeal on the ground that the costs ought to be charged upon the estate. I adhere to the opinion which I expressed in *Hope* v. *Carnegie* (3), that the general rule prohibiting such appeals is not only well established, but useful and desirable. I think this case forms no exception, and that our only course is to dismiss the appeal with costs.

SIR G. M. GIFFARD, L.J.:—

The rule which has been established respecting appeals for costs is very important, and, in my opinion, very salutary. In this case the order was made by reason of the conduct of the trustees. It is said that if the decree had directed the costs to be paid out of a particular fund, the persons interested in the fund might appeal, and therefore an appeal ought to be allowed in the converse case. But if trustees may appeal in such a case as this to get costs out of the fund, I see nothing to prevent all legatees or creditors who had been deprived of their costs doing the same. I am not disposed to extend the case of *Angell* v. *Davis* (4). *Bagot* v. *Bagot*

(1) 4th Ed. p. 1349.

(2) The reporter has ascertained, through the kindness of the Registrar, that in *Bagot* v. *Bagot* the principal Defendant and the trustees presented separate Petitions for a rehearing, and that the trustees appealed against the substantial relief granted, as well as against the order as to costs. Separate orders were made on the two Petitions.

(3) Law Rep. 4 Ch. 264.

(4) 4 My. & Cr. 360.

L. JJ. 1869. TAYLOR v. DOWLEN.

appears to have been a case of this description, viz.:—that the merits were properly in issue on the appeal, and the trustees were therefore able incidentally to contend for an alteration of the decree as to their costs. I agree that the appeal must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Price, Bolton, & Filder,* agents for Messrs. *Hockley & Russell, Guildford.*

Solicitor for the Plaintiffs: Mr. *F. Rolt.*

OVEREND, GURNEY, & CO. *v.* GURNEY.

L. C.
1869
July 14, 28.

Powers of Directors—Speculative Purchase—Imprudent Conduct—Deed kept back—Capital Lost—Liabilities—Damages at Law.

A company was formed for the purpose of buying the business of a firm of bill brokers, and by the memorandum of association the directors were empowered to buy it upon such terms and under such stipulations as to guarantee or otherwise as might be agreed upon. The prospectus referred to the memorandum of association and to a certain deed of covenant. By that deed the business was assigned to the company, and all accounts, except such as the directors should require to be reserved and excepted, were to be carried on by the company, and the partners in the business guaranteed that all debts due to the firm and taken over by the company were good. By a second deed of the same date, not mentioned or disclosed to the shareholders, assets of the firm to the nominal value of £4,213,896 were reserved and excepted, and provisions were made for guaranteeing payment by the partners of the balance which, after a certain period and under certain arrangements, should not be got in on this account. The company carried on business for some time, and then stopped payment.

A bill was filed by the company against the living directors and the executors of a deceased director stating these facts, and that the company had lost £1,500,000 by taking the liabilities of the business, and by the insufficiency of the guarantee, and charged that the directors had been guilty of a breach of duty in buying the business without obtaining the sanction of a general meeting, and in not taking mortgages on the property of the partners in order to secure the guarantee, but no fraud was charged against the directors:—

Held, on demurrer by the executors of the deceased director, that as regarded any loss beyond the money placed in the directors' hands, the remedy, if any, was at law, by an action of negligence, which would not survive against executors; and that, as regarded the money placed in the hands of the directors, the bill did not shew more than imprudence; and, having regard to the absence of *mala fides*, and to the powers of the directors, did not make a case of breach of trust against the deceased director:

That the purchase, however unwise, being within the powers given to the directors, they were not bound to call a meeting of shareholders:

That it was within the powers of the directors to have a second deed, and that whatever remedy an individual shareholder might have against the directors as having been misled by the keeping back of the second deed, there could be no relief on that account in this suit:

That the directors had a discretion, and were not liable for neglect in not taking mortgages on the property of the directors.

Demurrer allowed, reversing order of *Malins*, V.C.

THE bill in this case was filed by a company called *Overend, Gurney, & Co., Limited*, as Plaintiffs, against *H. E. Gurney, J. H.*

L. C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

Gurney, R. Birkbeck, H. F. Barclay, H. G. Gordon, W. Rennie, T. J. Gibb, and *J. D. Gibb;* the six first-named Defendants having been directors of the company, and the two last-named Defendants being the executors of *T. A. Gibb,* a deceased director; and the bill contained statements to the following effect:—

That at the time of the formation of the company, a firm of bill brokers and money dealers was carrying on, and had for many years carried on, business in the city of *London* under the style of *Overend, Gurney, & Co.,* and had attained the highest commercial reputation, and its business was universally supposed to be most successful and profitable.

That in the year 1857 the firm sustained heavy losses, and that in or about the year 1861 certain accounts upon which very large amounts were due to the firm, and also certain investments, were regarded with alarm by the partners, and that these accounts and investments amounted to £2,782,879.

That by the end of June, 1865, the firm was insolvent to the extent of at least £2,000,000, and the six partners in the firm (three of whom became directors in the company, and were the three first-named Defendants to this suit) were aware of the state of the firm.

That the six partners in the firm and *T. A. Gibb* devised a project for the formation of a company which should take over all the liabilities of the firm, and projected the arrangement which was afterwards made in the memorandum and articles of association of the company.

That a memorandum of association of a company under the name of *Overend, Gurney, & Co., Limited,* was subscribed by the six first-named Defendants, and by *S. G. Buxton* and *T. A. Gibb,* and was registered on the 12th of July, 1865, and contained the following provisions: "3. The objects for which the company is established are the receiving of money on deposit or by re-discount of bills, and the employment and investment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on the business of bill brokers and money dealers as heretofore carried on by Messrs. *Overend, Gurney, & Co.,* at No. 65,

Lombard Street, in the city of *London*, and, with a view to the above objects, the acquisition of such business upon terms to be agreed upon by the directors, and the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all acts and things incidental to or conducive to the attainment of the above objects."

That the articles of association contained a similar statement.

That immediately after the registration of the memorandum, a prospectus, which had been prepared by the intended directors with the privity and assistance of the other parties to the said project, was issued by the said intended directors for the purpose of establishing the company and inducing the public to apply for and take shares in the company, and the prospectus contained the following statements: "The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney, & Co.*, of their long-established business as bill brokers and money dealers, and of the premises in which the business is conducted; the consideration for the goodwill being £500,000, one half paid in cash, and the remainder in shares of the company, with £15 per share credited thereon—terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders. The business will be handed over to the new company on the 1st of August, the vendors guaranteeing the company against any loss on the assets and liabilities transferred." "Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company."

That in the course of the same month of July, 1865, the directors, without any communication with the shareholders, completed the purchase of the goodwill and business of the firm, and carried out the transfer by two indentures, to each of which the directors, in breach of their duties to the company, affixed the seal of the company, being aware of the condition and insolvency of the firm.

That the indentures were both dated the 27th of July, 1865, and were both made between the partners in the firm of *Overend*,

L.C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

Gurney, & Co. of the first and second parts, and the company of the third part. The first indenture was the deed of covenant mentioned in the prospectus, and the following were some of the provisions contained therein :—The vendors agreed to sell, and the company to buy, the business of *Overend, Gurney, & Co.*, as from the 1st of August, 1865, for £500,000, whereof one moiety was to be treated as paid by being allowed in account between the vendors and purchasers in cash, and the other moiety was to be paid by allotting to the vendors 16,666 shares of £50 each in the company, whereof £15 should be treated as paid : provided always, that the said company should be entitled, as far as the directors should require, to have the said sum of £500,000 applied and made available by way of material guarantee in aid of the covenants of the vendors for insuring the due performance of the covenants. Except such accounts as the directors of the company should require to be reserved or excepted to be wound up and closed by *Overend, Gurney, & Co.*, all accounts between *Overend, Gurney, & Co.* and any other person or persons (except accounts on which no interest had been paid by *Overend, Gurney, & Co.* for six years) should be carried on by the company in the place of *Overend, Gurney, & Co.* The vendors guaranteed the company that, irrespectively of any value to be attributed to the goodwill, the assets of which the company should take the benefit on the day of completion should produce a net amount of money equal to or exceeding the aggregate amount of money which the limited company might have to pay or provide in discharge of the obligations of the firm which the company might be called upon to satisfy ; and that all debts taken over by the company were good, and recoverable in full ; and that the vendors would indemnify the company against any loss, delay, or expenses in recovering the debts. The company would pay or allow in account the balance standing to the credit of the account entitled "The Private Ledger Account ;" but the guarantee of the vendors should extend to, and include the amount of, such balance. The vendors should continue to act under the firm of *Overend, Gurney, & Co.*, for the purpose of closing and liquidating any outstanding accounts or liabilities which the directors should deem it desirable should be so closed and liquidated ; and no securities belonging to such accounts should be

transferred to the company as part of the assets of the firm, but the same should be reserved and excepted by the firm, to be retained and disposed of by them for the purpose of winding up and closing such accounts: provided always, that no other place of business than the principal office of the company should be used for the purpose of winding up and closing such accounts. The offices of the firm should be bought by the company at a valuation; but the price to be paid should be available by way of guarantee in the same manner as was provided with respect to the £500,000.

That the second indenture was between the same parties, and contained recitals and some clauses similar to those in the first indenture. It further provided, that on the 1st of August, 1865, a separate ledger should be provided, and kept by the firm at the office of the company, to be called *Overend, Gurney, & Co.'s* "Old Firm Ledger of Excepted Accounts;" and that all the accounts and business comprised in a schedule to the deed should be deemed to be excepted accounts, and transferred to such ledger. An account called the "Suspense and Guarantee Account" should be opened and kept, and should be debited with the balance of the excepted accounts, and treated as representing money to that amount due to the company from the vendors upon an account stated between them. All the sums of money which should become due to the company from the vendors under their covenants in the contemporaneous indenture were to be placed to the debit of the suspense account; and the £250,000 to be allowed to the vendors was to be placed to the credit of the account; and all sums of money realized out of the excepted accounts were to be placed to the credit of this account, and provisions were made as to management of this account during what was called the suspense period, viz., until the 31st of December, 1868. If at the end of the suspense period the balance of the suspense and guarantee account should be on the credit side, it should be deemed to be a balance due by the company to the vendors; if on the debit side, it should be deemed to be a balance due from the vendors to the company, and should be paid by the vendors to the company. The company were to have a lien on the 16,666 shares allotted to *Overend, Gurney, & Co.*, for the purpose of securing the performance by the vendors of their covenants, and for protecting the company against

L. C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

loss or damage to be sustained in consequence of any breach of the covenants by the vendors. The schedule contained a list of accounts, the balance on which, due to the firm, amounted to £4,213,896.

That the second deed was not mentioned in the prospectus, and was not at any time made known to the members of the company, except the directors, before the winding up of the company; and that if the existence of the deed had been disclosed, and the true state of the firm had been fairly made known to the company, they would have refused to purchase the goodwill and business, or to take upon themselves the liabilities and engagements of the firm at any price.

That the liabilities of the firm exceeded the nominal amount of the assets other than those dealt with by the second deed by the sum of £3,160,181; and to meet this deficiency the directors of the company secured only such sums as might be receivable in respect of the assets, and such further sums as under the two indentures might be recovered from the partners in the firm.

That the sums recovered in respect of the assets were comparatively small, and that no attempt was ever made by the directors to enforce the guarantee.

That the company stopped payment on the 10th of May, 1866, and that such stoppage was entirely caused by the company having assumed the liabilities of the firm, and by reason of the guarantee being insufficient, and that the ascertained losses already amounted to £1,500,000 and upwards.

That under the circumstances, and in fact, the six directors who were Defendants, and *T. A. Gibb*, deceased, were guilty of a breach of their duty as directors in completing the purchase of the business, or, that at all events, they ought not to have done so without first calling a general meeting of the company and communicating to them the several facts above mentioned, and that the Defendants were liable to make good and pay to the company the loss which the company had sustained, and might sustain, in consequence of such purchase.

That the guarantee given by the partners in the firm was altogether inadequate and improper, inasmuch as, in the first place, the aggregate value of the private estates of the partners was not sufficient, by a very large amount, to make good the difference

between what was known to be the real value of the assets of the firm and the nominal value thereof; and further, that the directors neglected to require a mortgage of, or other effectual charge upon, those private estates so as to secure the efficiency of the guarantee and that, thirdly, the first-named directors had been enabled to apply, and had applied, very considerable parts of their private estates in payment of other heavy liabilities of the partners, and that other large portions of the private estates had since been disposed of by way of sale, transfer, settlement, or otherwise, and, in particular, that the Defendant *D. Gurney* had withdrawn a large portion of his private estate from the operation of the guarantee.

That the company had been ordered to be wound up, and that the liquidators under the winding-up approved of this suit.

That *T. A. Gibb* died in 1866, and that the Defendants *T. J. Gibb* and *J. D. Gibb* were appointed his executors, and had proved his will.

And the bill prayed that it might be declared that the Defendants were jointly and severally liable to make good to the company the amount of the loss which the company had sustained, and to indemnify the company against all such further loss as they might hereafter sustain by reason of their having purchased the said goodwill and assets, and having undertaken the liabilities of *Overend, Gurney, & Co.*, and prayed consequential relief. That if the Plaintiffs were not entitled to the relief aforesaid, then it might be declared that the Defendants were liable to make good to the company the amount of the loss which the company might sustain by reason of the neglect of the directors who were Defendants, and of *T. A. Gibb*, to make the guarantee by the partners in the firm effectual, by requiring and securing a mortgage or charge upon their several private estates. That the Defendants *T. J. Gibb* and *J. D. Gibb* might admit assets of *T. A. Gibb*, or that his estate might be administered.

To this bill the Defendants *T. J. Gibb* and *J. D. Gibb* demurred generally.

The demurrer was argued before the Vice-Chancellor *Malins*, who, on the 28th of April, 1869, overruled the demurrer (1).

(1) SIR R. MALINS, V.C.:—

The bill in this case is filed by the company called *Overend, Gurney, & Co., Limited*, which, although ordered to be wound up, or, rather, being wound up voluntarily under the supervision

L. C. 1869

OVEREND, GURNEY, & Co. v. GURNEY.

Sir *Roundell Palmer*, Q.C., Mr. *Glasse*, Q.C., and Mr. *Jackson*, in support of the demurrer :—

No fraud is alleged in the bill, and, in fact, the only case made

---

of the Court, is still a subsisting company, and capable of suing against those of the directors who still survive, and against the representatives of Mr. *T. A. Gibb*, who is dead; and the object of the suit is to make the surviving directors, and the representatives of the deceased director, liable for the losses which have been incurred in consequence of their having purchased this business. It has been admitted at the Bar that the bill is most properly framed. It makes no charges of personal misconduct, and the case has not been treated, nor is it necessary to treat it, as one involving any charges that the conduct of the directors in making the purchase of this business was fraudulent, or that they intended to do otherwise than discharge that which they thought their duty to the shareholders who had joined or were likely to join this company.

The bill presents the case most fairly as one in which, according to the allegations of the bill (which, for the purposes of my decision, it being upon demurrer, must be admitted to be true), the directors are charged with such a neglect of duty as renders them personally responsible. It must be borne in mind that this being a demurrer, I am not called upon to decide, nor do I intend to decide, anything except the simple question whether this is a bill which must at once be put out of Court by the allowance of the demurrer, or must be answered; and, therefore, in coming to the conclusion I do, I should wish to be understood as not giving any opinion as to what may be the ultimate result of this suit.

But for the present purpose I may make an observation, which cannot influence my judgment, but still is not immaterial, perhaps, to notice, that there being, I think, six surviving directors against whom the same liability is sought to be established as is sought to be established against the representatives of Mr. *Gibb*, they have all submitted to answer this bill. That does not prove anything undoubtedly, but it is not a circumstance perfectly immaterial, because I do not know what course the suit would now take with regard to those gentlemen if I were to allow the demurrer upon the ground urged on behalf of these Defendants—that the bill was wholly unnecessary, or, if necessary, was improperly framed.

Now, the allegations of the bill amount to this: that this company being formed on the 12th of July, 1865, by the registration of the memorandum and articles of association, the directors immediately after its formation issued a prospectus for the purpose of establishing the company and inducing the public to apply for and take shares in the company. Also, that the company was undoubtedly formed for the purpose of acquiring a particular business, although the directors took authority to buy other businesses.

Now, the argument in support of the bill is, that it was the duty of the directors so authorized to conduct the business in a business-like manner and with ordinary caution, and that when they were authorized to buy this business, they derived the authority from those who believed that which was stated in the prospectus, namely, that the business could not fail to prove

is, that the bargain made was exceedingly improvident. It is true that the second deed was not mentioned in the prospectus, but it was obvious that there was such an arrangement, and its production

highly remunerative. But, according to the allegations of this bill, the concern was at that time insolvent to the extent of more than three millions of money.

The bill states that the fact of that insolvency was well known to the partners in the firm, and it also states that the directors of the company, without any communication with the shareholders, completed the purchase in breach of their duty to the company as such directors. There is also a most material allegation; that, previously to and at the time when the directors completed the purchase, all of them were fully aware of the condition of the firm, and of the fact, nature, and extent of its insolvency. So that the bill alleges that these directors, who were authorized by the company to purchase this business in the belief of all its members that the business had that character which I have stated, did, with the complete knowledge of its condition and of the extent of its insolvency, enter into a contract in the name of the company to purchase the business for a large sum of money, the circumstances being unknown to the shareholders in the company.

But then the bill also states, that the directors relied upon a guarantee of the old partners that, so far as the assets did not produce enough to make good this deficiency, the company was to resort to the private estates of the partners; and the bill states that the guarantee was wholly insufficient, and, further, that the directors neglected to require a mortgage of, or other effectual charge upon, those private estates, so as to secure the efficiency of the guarantee, and that, by reason of the absence of such mortgage or other effectual charge, the partners had been enabled to apply, and had applied, very considerable parts of their private estates in payment of other heavy liabilities, and that other large portions of the private estates had been disposed of by way of sale, transfer, settlement, or otherwise.

Therefore these allegations amount to these three things: First, a knowledge of insolvency to the extent of £3,000,000; secondly, the professed taking of an insufficient guarantee to meet that deficiency; and, thirdly, that, in point of fact, they did not take a security which it was their bounden duty to take:—[His Honour then read several passages from the latter part of the bill and from the prayer.]

It is therefore distinctly alleged by the bill that there has been a neglect of duty on the part of these trustees, who, undoubtedly, according to the allegations of the bill, and apart from the allegations of the bill, must be considered as only authorized to purchase that which was worth purchasing, namely, a solvent and money-making, and not a money-losing and insolvent, concern. That the allegations of this bill amount to a distinct charge of a breach of trust or duty on the part of the trustees, can admit of no shadow of doubt whatever. Then, if there be on the part of these Defendants an admission—because by demurring to the bill they have admitted the charges of the bill—of a very great neglect of duty by the directors, which has thrown upon the body of which they were directors or trustees an enormous loss, certainly one would say that it is a bill which

L. C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

would have made no difference. Moreover, these Defendants are executors, and though an agent is liable at law for negligence, that liability is not transmitted to his representatives, under the old rule *actio personalis moritur cum personâ*.

Also, this bill is filed by the company, not by the individual shareholders, who might each complain, but the company cannot.

---

requires, at least, to be answered, and it would be a very strong case indeed which would induce the Court summarily to dispose of such a case as this by allowing a demurrer to the bill, and so putting the Plaintiff at once out of Court without any remedy whatever. Upon principle, therefore, I should say that this bill is one that requires an answer.

But then some other objections have been taken, and it is said that the company is incompetent to sue in its corporate capacity its own directors. But I apprehend that that point has been settled long ago by the decision of Lord *Hardwicke* in the celebrated case of *Charitable Corporation* v. *Sutton* (2 Atk. 400). It was argued at the Bar that this case has not been looked upon quite favourably. The decision was made in the year 1742, and no case has been cited in which it has been overruled, or in which it has been judicially impugned. That case therefore standing, and having been acted upon very frequently, and so recently as in the case of *Society of Practical Knowledge* v. *Abbott* (2 Beav. 559), I must take it to be the law, and consider that I am bound to follow it. [His Honour then read parts of the judgments in those two cases, and continued:—]

Upon these authorities, therefore, I apprehend that on a bill being filed by a corporation charging its directors, who are trustees for the proper performance of their duty, with a neglect of duty so gross as that which is charged in this bill, I should be bound to overrule the demurrer, and say that such a bill must be answered.

But I am informed that the Lords Justices have lately decided that in all cases between the company, or between the contributories and their directors, on any internal question as to the affairs of the company being wound up under the *Companies Act*, instead of filing a bill, all that could be obtained by a bill may now be obtained by the summary proceedings prescribed by the 165th section of that Act.

Although the Lords Justices have laid down that much may be done under this 165th section, I can hardly think that they meant to go to the extent of saying that a bill is no longer necessary, or, at all events, that a bill is no longer sustainable; because, although it may be done under the summary jurisdiction, there is no enactment that a bill shall not be resorted to. My own opinion is, that if this case had been presented to any branch of the Court upon a summons, the Court would have held that it was not a case to be disposed of in such a summary way, and was a case for a bill, on which alone it could be decided. On every ground, therefore, and considering that a *primâ facie* case is made which requires an answer, I am of opinion that this bill must be answered, and that the demurrer must consequently be overruled.

If this bill could stand, the company could recover, and then each individual shareholder might file his bill, and all the suits might go on at once. It is only a question of account, and these sums must be allowed to the directors. They may have acted imprudently, but not with such gross imprudence as to make themselves liable. This suit is, in fact, a suit for damages, and the remedy, if any, is at law.

Mr. *Cotton*, Q.C., and Mr. *Ferrers*, for the bill :—

There may be a remedy at law for each individual shareholder, but that is no reason why there should not be a suit to bring back into the funds of the company money which has been misapplied by the directors. Whatever is recovered in this suit must be taken into account in any proceeding by any shareholder.

This is not a suit for damages. We say that £1,500,000 has been lost by the misconduct of the directors, and we ask to have it brought back as a specific sum lost by trustees, and not as unliquidated damages. The death of Mr. *Gibb* is only a bar to an action at law for damages, not to a claim for a breach of trust. We say it was a breach of trust to buy the old business at all, as the company was formed not for that purpose only, but to carry on the bill-broking business generally, and when the directors, on investigation, found the firm of *Overend, Gurney, & Co.* in an insolvent condition, they should not have made the purchase. Their powers were to buy a concern under the ordinary mercantile risks, not a hopeless business like this. They knew the enormous liabilities, and that upwards of £4,000,000 of debts were so bad as not to be taken over. If the contents of the second deed had been known, the company would never have been formed, for no one would have taken a share: *Oakes* v. *Turquand* (1). There is no reason why the company should not maintain this suit. *Charitable Corporation* v. *Sutton* (2) is an authority. In all cases of misrepresentation there is a concurrent jurisdiction : *Wilson* v. *Short* (3) ; *Ingram* v. *Thorp* (4) ; *Rawlins* v. *Wickham* (5).

(1) Law Rep. 2 H. L. 325, 343.
(2) 2 Atk. 400.
(3) 6 Hare, 366.
(4) 7 Ibid. 67.
(5) 3 De G. & J. 304.

L. C. 1869

OVEREND, GURNEY, & Co. v. GURNEY.

July 28. LORD HATHERLEY, L.C.:—

I have very carefully considered the case, and it appears to me that this bill cannot be sustained as against the demurring Defendants. The bill is of a very singular character. It endeavours to raise, and I have no doubt does raise, properly and fairly, the case in dispute between the two parties. The bill states that Mr. *Gibb*, of whom the demurring Defendants are the personal representatives, was a director of a company which had been formed for the purpose of buying a certain business of *Overend, Gurney, & Co.*; and it is said that Mr. *Gibb* and his co-directors so exercised this function of purchasing on behalf of the company that they have, by their imprudence (for it is not in my opinion or in that of the Vice-Chancellor put any higher), made a very burdensome purchase, and have fixed the company, in consequence, with a very heavy loss, and the bill seeks solely on that ground—want of wisdom, and want of judgment—to fix the Defendants with the consequences. The bill does not aver, from the beginning to the end, that there was any fraud on the part of Mr. *Gibb*, and, indeed, from the averments in the bill it must be almost taken to be impossible that it should be so, because he himself was a purchaser, and had an interest in the concern; and I cannot put the case in that respect more highly in favour of the demurring parties, or more adversely to the bill, than by stating the conclusion to which the Vice-Chancellor came, and in which I entirely concur. He says: "There is no charge that the conduct of the directors in making the purchase of this business was fraudulent, or that they intended to do otherwise than discharge that which they thought their duty to the shareholders who had joined, or were likely to join, the company." Therefore it is to be taken that Mr. *Gibb*, who was not one of the original partners, has done nothing more than that which he believed to be the proper discharge of his duty.

The bill, however, contains averments which tend to shew that in so discharging his duty he has acted in a manner which has entailed great loss, owing (as the bill puts it) to circumstances and facts which were brought to his knowledge, and which ought to have deterred him and his co-directors from entering into this purchase which they had been authorized to make on behalf of

the company. Accordingly the bill charges that very heavy losses have been sustained, and seeks to make Mr. *Gibb* and his co-directors jointly and severally liable "to make good and pay to the Plaintiff company the amount of the loss which they have sustained, and to indemnify them against all such further loss as they may sustain by reason of their having purchased the said goodwill and assets, and having undertaken the liabilities of the said firm of *Overend, Gurney, & Co.*"

Now, it seems to me that the case here divides itself into two branches: and, with respect to one branch of the case—the loss which has accrued in consequence of the debts and liabilities which have fallen upon the new company irrespective of the loss of their capital—I confess I think it is quite impossible for a bill to be sustained in this Court, and that whatever remedy there may be would be by an action at law for negligence. It has been argued, and I am not prepared at present to say that the case would not require a good deal more consideration if it had rested upon that alone, that, to the extent of the capital placed in the directors' hands, Mr. *Gibb* and his co-directors are responsible to the shareholders, following the case of *Charitable Corporation* v. *Sutton* (1), according to which it would be possible for this Court to hold, that if a certain body of people place a given sum of money in the hands of any person to be laid out, and he lays out that money in such a manner that he can be said to be guilty of a breach of trust towards them, he may be answerable for the amount of money so placed in his hands, and so wasted. But to hold that the directors are further to be pursued in this Court in respect of all liabilities that have been occasioned by the property in which the money was invested being a *damnosa hæreditas* beyond the amount of the property lost, seems to me, in the absence of any fraud, a proposition which would be extremely difficult to sustain. All the loss, beyond the capital which they may be supposed in this case to have had in their hands, might form the proper subject of an action for negligence, if the Plaintiffs thought they could maintain such an action in the absence of any fraud being charged: and the consequence of that would be, that the executors of Mr. *Gibb* could not be pursued at law, for the tort would be personal. It certainly

(1) 2 Atk. 400.

L. C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

seems to me that they could not be pursued in equity with reference to any such loss as that which I have last mentioned.

However, I have now to consider the case so far as it relates to the money placed at the disposal of Mr. *Gibb* and the others to be laid out on behalf of the company, and I have to consider whether or not the acts of the directors, as charged in the bill, amount to such a breach of trust that Mr. *Gibb*, or his personal representatives, are liable in respect of that breach of trust for the loss which has taken place. And in this respect the case is almost of first impression; because all the cases which have hitherto occurred have not been cases of parties having full power to do all that they have done, and being held to have done it imprudently or unadvisedly, but have been cases in which fraud has been alleged. They have been cases, not of suits by the company to get back the assets of the company, but cases of suits by individual shareholders who have said that they had been induced by the fraud, misrepresentation, and misconduct of the directors, to become shareholders in the company. And one of two things has been tried—either to make the directors personally responsible for the moneys that have been so obtained by fraudulent misrepresentation; or, what is more common, as in the case of *Oakes* v. *Turquand* (1), and cases of that kind, to escape from the contract altogether, and to be liberated from their position in the company, and to have their names struck out from the company's list, as having been brought into the company by fraudulent acts on the part of those who were, for that purpose, to be taken as the agents of the company. But such a case as this—namely, a bill by the company against the directors, alleging in fact that the company had employed the directors as agents to purchase a certain property, that they had not misconducted themselves in any way which could be regarded as fraud, but had misconducted themselves in purchasing that which it was unwise and imprudent for them to purchase, is, to my mind, a case of first impression.

I must, in the first place, consider the character of the purchase which the directors were empowered to make. They were not to buy an ordinary estate, in which case they might, no doubt, be held guilty of such an amount of gross negligence as, if not actually

(1) Law Rep. 2 H. L. 325.

amounting to fraud, would make them liable in this Court as trustees to their *cestuis que trust*. But this was a purchase which must be of an extremely speculative nature. Everybody knows that all trades are speculative, and the trade of a bill broker cannot be considered as the least so. That being the case, the authority which the directors received, as found in the articles of association and the memorandum of association, appears to be this: A company is to be formed, with the object of "carrying on the business of bill brokers and money dealers, as theretofore carried on by Messrs. *Overend, Gurney, & Co.*, and with a view to the above object, the acquisition of such business upon terms to be agreed upon by the directors, and the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms as the directors should think expedient." The company is, therefore, to embark in that which must always be a hazardous business—a business entirely dependent on the prudence and dexterity of those who manage it. Then the articles of association authorize the directors "to purchase or acquire upon such terms, and under such stipulations as to guarantee or otherwise, as may be agreed upon, the business and goodwill of the said Messrs. *Overend, Gurney, & Co.*, as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company." There is the largest possible power given to these gentlemen to buy this, which was, in itself, a speculative business, and they are to do it entirely in such manner as they may think expedient.

Now let us see what are the errors of judgment of which they are accused. It is stated in the bill that *Overend, Gurney, & Co.* had at the time when this company was formed, or about that time, attained the highest commercial reputation, and that their business was universally supposed to be most successful and profitable. It is further stated, that in or about the year 1861 certain accounts upon which very large amounts were due to the firm, and which were wholly unsecured, or insufficiently secured, and also certain investments, were regarded with alarm by the partners. Those debts amounted to £2,782,000; and, regard being had to the enormous amounts due from some of the parties, I may take it that

L. C. 1869

OVEREND, GURNEY, & CO. v. GURNEY.

these were not very eligible investments in the way of business. The bill further states that by the end of June, 1865, the said firm was insolvent to the extent of at least two millions sterling. That probably is the strongest averment in the whole bill; but, at the same time, I think it must be taken to mean exactly what it says, namely, that if the firm had stopped on that day, they would not have had assets sufficient to meet their liabilities by the amount of two millions.

Still I must not assume more on behalf of the pleader than is averred, and certainly not more than the statements will justify; and I apprehend it to be the case in all large concerns of this kind, that there are a number of debts which are not available on a given day, but which nevertheless may be of considerable value if time be allowed, time being in mercantile affairs most important with regard to everything of this description. However, we must take it that they, according to the averments in the bill, upon that day in June owed more than two millions beyond their assets.

[His Lordship then read extracts from the bill as to the arrangement between the new company and the old firm of *Overend, Gurney, & Co.*, and commented on them.]

The scheme, therefore, may be reduced to this: the partners in the old firm say, We are in a state of insolvency at this moment to the extent of two millions; but we have four millions owing to us, and we want time to get that four millions in; we will set off our one million which is due to us as partners against those debts; we will also leave £250,000, part of the sum to be paid for goodwill, as entering into that account, and so far reducing the amount which we are ultimately to pay to you. The time given for realizing is to be two years and a half, which is called the "Suspense Period," and during that period we will try to get in these four millions; we will get in as much as we can, and we will guarantee you the difference at the end of the time. No doubt, to one not accustomed to be engaged in hazardous transactions of this kind, this does seem to be a most hazardous speculation, and one which probably few persons in this Court would be disposed to enter into; but I must take it upon statements in the bill, that those who entered into this concern themselves believed that they were discharging their duty; that is to say, that, having power to

buy the business upon the best terms they could make, and having power to take a guarantee, which implied that they might possibly find a necessity for a guarantee in respect of the liabilities, they entered into this arrangement, and they bought a business which has turned out to be not so profitable as was anticipated. However, it was evidently a speculation, because there were these four millions of debts, which were to be worked off by the suspense account, and, upon the face of the bill, it would be absurd to suppose that the whole of the four millions would be realized. But, then, how are we to tell what portion was expected to be realized? It was more than double the amount of the present insolvency, and in that state of things how can I say that Mr. *Gibb*, who has not exceeded in any particular the letter of his power, has committed a breach of trust towards those who employed him as their agent, for which his estate is to be answerable? They employ him to buy this concern, believing it to be, although a hazardous yet a flourishing one; and the view which I must take is, that he bought it believing it to be a flourishing concern.

The only averment I find which seems to have pressed on the mind of the Vice-Chancellor is that, having this authority given, the directors called no meeting of the shareholders for further powers; but I apprehend that I cannot hold that the directors are liable for not doing so. Mr. *Gibb* being quite willing to enter into the speculation, how was it possible that he should know that the others were not as willing to enter into it as himself? How could the directors dive into the minds of all the shareholders? How could Mr. *Gibb* know anything as to the feeling of security which might exist in the minds of others with regard to the affairs of *Overend, Gurney, & Co.*, and how was he to know that it was not the same as that which he himself felt? If I were to hold any such doctrine as that, it would involve in extreme peril many transactions which we all know were going on some few years ago. At that time business after business was being bought, and if I were to hold that persons entering into a treaty to sell their business to a company were liable to this—that the new directors with whom they treated on behalf of the purchasing company were to be informed fairly and fully of the state of the concern, and were then to lay the whole of the affairs of the concern before a public

L. C. 1869

OVEREND, GURNEY, & Co. v. GURNEY.

meeting of shareholders before the affair could be dealt with, it would of course at once put a stop to the buying and selling of businesses of this description. No doubt the sellers would desire their affairs to be kept private, and not desire to have them ransacked; and unless there were persons with whom they were authorized to deal, and whom the company had entrusted and were content to rely upon, it would be impossible that transactions of this description could be carried out. If, then, I do not find that they have acted in breach of their duty—if I do not find that they have done anything more than make a bad bargain—it appears to me that I cannot assume that the company are thereupon entitled to say that Mr. *Gibb* is responsible for a breach of trust, he only having done that which they sent him to do, having bought this business, but with an amount of knowledge which he must necessarily as a director acquire, exceeding the amount of knowledge which was acquired by them.

After the arrangement had been made, a prospectus was issued, and I cannot help thinking that there has been some confusion in that part of the argument between the case of those who were misled by the prospectus, which was relied on in *Oakes* v. *Turquand* (1), and the case of those who depend upon an agent, and give him full confidence as an agent, when he has not acted as a wise or prudent agent. We are told that the company was registered, and that the arrangement had been made immediately after the registration of the memorandum of association. The Plaintiffs say that the prospectus was prepared and intended to be issued, but then, in the meantime, the company had been formed. The prospectus says that the company was formed for the purpose of carrying into effect an arrangement which had been made (therefore, that shews that it had been done) for the purchase from Messrs. *Overend, Gurney, & Co.*, of their long-established business as bill brokers and money dealers, upon terms which, in the opinion of the directors, could not fail to ensure a highly remunerative return to the shareholders. I cannot say that was not their opinion, however sanguine it might have been, and nobody can doubt, even now that we know the full extent of the disaster, that the value of the goodwill of the business of *Overend, Gurney, & Co.* was at that time enormous. There-

(1) Law Rep. 2 H. L. 325.

fore it is impossible for me to say that these directors might not well have said to the old partners in *Overend, Gurney, & Co.*: "You have been very imprudent, but you have got a splendid business; when you have money at call you should not have these large investments of money which are not at call; we will conduct the business on a new footing; we have our new capital; we have your four millions of debts to make the best we can of; and having your goodwill, and the enormous extent of business which you have at your command, we shall be able to make that again a flourishing business which had evidently been in former times a flourishing business;" for it is alleged that before 1861 there was no doubt whatever upon that subject.

There is one other point which I ought to notice. There were two deeds between the new company and the old firm. One is an ordinary deed with reference to the arrangement with the company; and in that deed there is contained also the arrangement about the £500,000, the £250,000 in shares, and the £250,000 to be paid by the company. The other is a separate deed as to the suspense account and the suspense period, containing the arrangement as to the four millions to be worked off in the way I have described, and in respect of which the guarantee is to be given at the end of the suspense period of two and a half years. Then the prospectus says: "Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company." Great stress was laid by the Vice-Chancellor in this case, as in the case of *Oakes* v. *Turquand* (1), upon the second deed not being brought forward, and it was said that if the second deed had been produced many persons would not have subscribed. How far an averment of that kind is to be taken as an averment of fact I think is a very doubtful matter; to say that any particular person would or would not have subscribed if this or that had or had not been done is predicting the future, and cannot be taken as an averment of fact. But, whatever may have been done, I apprehend that I have only to consider whether the second deed was *ultrà vires?* It seems to me that it was not *ultrà vires* at all. The directors had the power to buy under such

(1) Law Rep. 2 H. L. 325.

L. C. 1869

OVEREND, GURNEY, & Co. v. GURNEY.

terms as they thought fit, and taking such guarantee as they thought fit. The second deed is the guarantee which they think it fit to take; and I must say that, there being no fraud, but a total absence of anything like fraud, it would be impossible for me to say that taking such guarantee as they think fit means that they are also to take mortgages. No one ever heard that in buying a company's business there is to be also a mortgage security. There is nothing whatever in the contract to shew that in taking these guarantees the directors were bound to take guarantees in the shape of mortgages on the real property of the several partners. The partners were all thought to be men of wealth, and there is nothing to shew, in truth, that the bulk of them were not men of wealth; subject of course to this question of the two millions, which if the firm had broken up at that moment might have been demanded of them.

Then the case is reduced to this: As regards one half of the bill I hold it to be utterly untenable, namely, as to damage accruing *ultrà* the money placed in the directors' hands. That I hold to be simply a case of negligence, for which no proceedings can now be had against the executors of Mr. *Gibb*. But whether there has not been a waste of the assets put into the hands of the directors, looking to the terms of the agreement, the authority which was given to him, the circumstance that he is not alleged to have acted *malâ fide* in any part of it, and that the only allegation against him is that he has not made a sound and profitable bargain under the circumstances of the case, I think that the shareholders must take the consequences of the manner in which their business was conducted by those whom they have trusted to act as their agents. If the question were simply whether they had or had not made a bad or imprudent bargain, that is not a question which could be dealt with in this Court as involving a breach of trust; or, if it were, whether they had failed to secure a good bargain for persons who intrusted the moneys to them for that purpose, that is not the case we have here. The company must take the consequences of having intrusted their moneys to persons of sanguine temperament who have made a purchase which turns out to be a bad one; but I do not find enough in this case to shew me that it is so ridiculous or absurd, or that there has been such *crassa*

negligentia, amounting to fraud, as to induce me to hold that the gentleman whose executors are now sought to be impeached had made himself responsible for a breach of trust for which I can hold them liable.

With reference to the prospectus, it seems to me to have little or no bearing on this case, and I should not have referred to it if it had not been for the reliance placed on Lord *Chelmsford's* observations in *Oakes* v. *Turquand* (1), that the directors were not justified in keeping back the second deed, when they were inviting persons in the prospectus to join the company. I have nothing more to say about that part of the case. That may or may not justify a particular creditor saying, "You have misled me by the representations of your prospectus, and therefore I ought to be released from the company altogether;" but that is a totally different case from that of the company itself having armed these gentlemen with an authority which they have exercised. This case does not depend upon what was said or done in the prospectus, but upon the terms of the articles and memorandum of association, which contain the contract between the company and the body of directors. There I find that the directors are armed with such powers as justify me in saying that, if they have acted to the best of their judgment, however erroneously, they are not liable to answer for a breach of trust to those who have entrusted them with such large powers.

I hold, therefore, that the demurrer ought to have been allowed, with the usual consequences, and the decision will be reversed accordingly.

Solicitors for the Plaintiffs: Messrs. *Maynard, Son, & Co.*

Solicitors for the Defendants: Messrs. *Uptons, Johnson, & Upton.*

(1) Law Rep. 2 H. L. 343.

L. C. 1869 Feb. 10, 12, 13; March 24.

ATTORNEY-GENERAL *v.* SIDNEY SUSSEX COLLEGE.

Charity—Will—Construction—Education—College—Long Usage—Statutes of University Commissioners.

A testator, in 1641, gave lands to *Sidney Sussex College, Cambridge*, and *Trinity College, Oxford*, for the only use, education in piety and learning, of ten descendants of the brothers and sisters of the testator and of his two wives, and in default of such to their poor kindred.

The two Colleges accepted the gift, and each had always required that those persons who claimed the benefit thereof should become members of the College, and be educated there, and when there were no such claimants, each College had appropriated a moiety of the rents to their own purposes:—

Held, upon the construction of the will, that any descendants claiming the benefit of the gift must become members of one of the Colleges, and be educated there, and that, subject to that trust, the Colleges were entitled to the lands in equal moieties:

Held, also, that if the construction of the will had been doubtful, the contemporaneous usage might be referred to, and that the Court would not assume a long series of breaches of trust to have been committed.

The University Commissioners, in 1860, made a statute as to *Sidney Sussex College*, that subject to the legal rights of any persons beneficially interested under the will, the emoluments derived from the lands should be carried to the general funds of the College:—

Held, that *Sidney Sussex College* took one moiety of the rents and profits freed from the charge of educating any descendants under the will, and that a scheme must be prepared as to the moiety taken by *Trinity College*.

Decree of the Master of the Rolls varied.

FRANCIS COMBE, of *Hemel Hempstead*, in the county of *Herts*, Esquire, made his will, dated the 1st of May, 1641. The will was divided into articles, which were numbered, and the following articles relate to the questions in this suit:—

"2. I make my executor my brother-in-lawe, *Henry Ewer*, Esqre., *Thos. Greenhill*, gent., and my brother, *Tobie Combe*, gentleman, and my brother, *John Cheshull*, gentleman."

"15. I give all my books, except somme fewe my friends desire, equally to *Sydney Colledge* in *Cambridge* and *Trinitie College* in *Oxford*, excepte the Greate English Bible."

"17. I desire all doubts may be equally amended by my said executors, to whom I give to each, besides their expenses herein, £10 in plate onely, and the overplus of my goods to those that

want most of my next kindred, and my house by *Abbotts Langley Church* I give for ever one-halfe of the rent thereof to the poore there, quarterly, and the other halfe rent to any, quarterly, that will teache poore children English there, for ever memorie to my dear wife Mrs. *Ann Greenhill*."

"22. I revoke the former article of sale of *Abbotts Langley* and appurts., and will and ordaine that all my houses and lands and tythes and goods I have in *Hempsteed* shall be in possession of my father *Greenhill*, and my aforesaid trustie servant *Francis Hodges*, and two other sincere and impartiall men as aforesaid, to pay the said debt for *Abbotts Langley* and my legacies, and doe presently infeoffe the twoe Colleges aforesaid, and their successors for ever, with all I have in *Abbotts Langley* and the lordship there, and the meadowe in *Saint Stephens*, with the appurts., equally betweene the said Colledges for the only use, education in pietie and learninge of foure of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife, or, in default of such, to their next poor kindred for the fust, by the father's side for the second, by the mother's side and the lease of the said *Langley* to be at one third parte under the value to my said wive's kindred ever, viz., brothers and sisters there and at *Harrowe*."

"27. I give out of my lands, tenements, and goods in *Hemel Hempsteed* aforesaid £10 for ever to a free schoole for teachinge poore there to cast accompt, to read English, and to write, in *Watford*, in the county of *Hartford*. And to the Abby Church of *St. Albones* for ever out of my said lands, tenements, goods, teiths, &c., in *Hemel Hempsted*, £10 for ever soe longe as there shall bee a weekly sermon on Saturday, to bee chosen by the greater parte of the best inhabitants within the liberties of *St. Albons* burrowe, on com. aforesaid, and such of my former books in folio, 4to, 8vo, or 16mo., as Mr. *Randall Nicholl*, of the Hall in *Henden* in comitatus *Middlesea*, and Mr. *John Kinge* of *Abbotts Langley* aforesaid, and my brother Mr. *Greenhill*, or any two of them, shall thinke least fitt for the said Collidges in the said Universities for ever to the use of the clergie and schoolemaster in the said liberties, and also to the twoe vicars of *Saint Stephen's* and *Saint Nicholl's*, and

L. C. 1869

ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

their successors. And I appoint my father *Greenhill* aforesaid, and my three last-named friends, overseers in trust of all my lands, goods, and leases, and estate whatsoever at my cost and eward, to bee in possession of all the premises in all counties, till by good consell the true intent of all this my will may be performed soe much as I shall not doe sufficiente in my life tyme."

The testator died shortly after the date of his will, and ever since his death *Trinity College, Oxford,* and *Sidney Sussex College, Cambridge,* had managed and received the rents derived from the testator's estate at *Abbots Langley,* but had never been enfeoffed thereof. The estate consisted of a manor and mansion-house and cottages, and 142 acres of land, and the two Colleges had treated their interests therein as undivided moieties. The Colleges had always granted leases of the estate to members of a family named *Greenhill,* who were, or claimed to be, descendants of a brother of the testator's second wife, at rents one-third under the true annual value of the lands, in accordance with the direction contained in the will.

Each of the Colleges had, ever since the death of the testator, required that the persons who from time to time claimed the benefit of the gift contained in Article 22 of the will should become members of one or other of the Colleges, and should pass through a course of university study there, and should reside there during the periods from time to time required of undergraduates.

As to *Sidney Sussex College,* in October, 1646, an order was made by the Master and Fellows to the effect that the money received from the estate at *Abbots Langley* should be disposed of for public expenses, and the common dividend, except what should be disposed for the testator's kindred; and in December, 1646, a further order was made that, if there should be but one of Mr. *Combe's* kindred of the College, he should have £10 a year; if two, £9 each; if three, £8 each; if four, £7 each; if five, £6 each: and that the surplusage should follow the order above. Certain scholarships at *Sidney Sussex College,* called *Combe Scholarships,* were supposed to have been held under the will. In 1852 one *H. E. Huxley* claimed to be a descendant of a brother of the testator's second wife, and was admitted a member of the College, and received certain sums of money out of the general funds of the College;

but no one had made a similar claim since that time. The College had always applied the rents received from the estate during the intervals when no member of the families mentioned in the will came forward to take the benefit of the gift, as part of the general funds of the College. And the College had never during such intervals applied any part of the rents for the benefit of the members of those families, or for the testator's poor kindred. *Sidney Sussex College* was founded in the year 36 Eliz. by royal charter, which recited the intention of the Countess of *Sussex* to found "*aliquod monumentum egregium non solum in augmentationem et incrementum pietatis ac cujusvis bonarum literarum generis et ad juvenum ac aliorum in pietate, virtute, disciplinâ, bonis literis, ac scientiâ educationem et instructionem,* &c."

The Commissioners appointed under 19 & 20 Vict. c. 88, made certain statutes, which under that Act became statutes of *Sidney Sussex College*, and thereby provided that after payment of the stipends, allowances, and scholarships, expenses of management of College property, repairs of buildings, maintenance of domestic establishment, and other needful general expenses, the remainder of the general funds or annual revenue of the College should be divided among the Master and Fellows as therein mentioned. And the Commissioners made a further statute as follows:—8. Mr. *Combe's* benefaction. Subject to the legal rights of any persons beneficially interested under the will of *Francis Combe*, Esq., all the emoluments derived by *Sidney Sussex College* from the estate at *Abbots Langley*, in the county of *Hertford*, devised by the said *Francis Combe* in his will, shall be carried to the general funds of the College, to be applied in the manner directed by the statutes of the College."

As to *Trinity College, Oxford*, only four persons were known to have claimed the benefit of the gift, and one of them was in 1864 a commoner of the College, and those several persons received the whole income of the moiety of the estate at *Abbots Langley*. When there were no claimants, the rents were divided among the members of the College; but since 1826, in pursuance of an opinion of counsel taken at that time, such rents had been applied in exhibitions to deserving members of the College.

On the 29th of April, 1863, an information (*Attorney-General*

L. C. 1869

ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

v. *Greenhill*) was filed at the relation of *Trinity College, Oxford*, against *F. Greenhill*, the then lessee of the lands, in order to ascertain the construction of the devise contained in the will; and by a decree made by the Master of the Rolls on the 7th of December, 1863, it was declared that the direction contained in the will as to leasing the estate at one-third under the true value was void, and that the whole interest in the said estate was given to the two Colleges, and a scheme was directed to be settled accordingly (1). *Sidney Sussex College* was not a party to that suit.

On the 18th of March, 1864, the present information was filed, in which *Joseph Greenhill*, a descendant of a brother of the testator's second wife, was the informant, and the Master, Fellows, and Scholars of *Sidney Sussex College*, and the President, Fellows, and Scholars of *Trinity College*, and *Frederick Greenhill*, were Defendants, stating as above stated, and praying a declaration that the educational gift and the gift to the poor kindred made by Article 22 of the will were good charitable gifts, and praying that the construction of the will, so far in particular as it regarded the said gifts, and the direction to lease the said estate at *Abbots Langley*, and generally of Article 22, might be declared and settled by the Court.

The information came on to be heard before the Master of the Rolls, who made a decree making certain declarations and directing inquiries, which decree was varied on appeal by striking out the declarations and extending the inquiries so as to include both descendants and poor kindred. The result of the inquiries was, that a large number of persons, both male and female, were found to be descendants, but no poor kindred other than descendants came in under the advertisements. The information came on again before the Master of the Rolls, who, on the 20th of November, 1868, made a declaration that the lands in question were vested in *Trinity College* and *Sidney Sussex College* in equal moieties as tenants in common, in trust to educate or to provide for the education in piety and learning of four of the descendants of the testator's brothers and sisters, and three of the descendants of the brother and sister of the testator's first wife, and three of the descendants of the brothers and sisters of his second wife, such ten persons to

(1) 33 Beav. 193.

be selected in turns by each of the Colleges. And his Lordship declared that the term "descendants" included females as well as males, and was not confined to persons of an age to receive education at either of the said Colleges, and declared that, in default of such persons being in existence and being so selected and educated as aforesaid, the poor kindred of the testator's wives were entitled to the gifts of the testator for their own absolute use and benefit. And his Lordship directed a scheme to be settled, as reported (1).

Each of the Colleges appealed from this decree.

Mr. *Cole*, Q.C., and Mr. *Rigby*, for *Sidney Sussex College*:—

We contend that, according to the true construction of this will, any persons claiming the benefit of the gift must do so by entering as members of the College, and following the regular course of University education; and that whilst there are no claimants the College is entitled to the rents of one moiety: *Thomason* v. *Moses* (2). If it is merely a gift to these descendants, and not a gift for the purpose of education, it is not a charity and is void. Moreover, if there is any doubt as to the construction of this will, then usage and the long acquiescence of the persons who could have claimed are conclusive in favour of the College: *Attorney-General* v. *Smythies* (3); *Attorney-General* v. *Pearson* (4); *Attorney-General* v. *Caius College* (5); *Attorney-General* v. *Catherine Hall, Cambridge* (6); *Attorney-General* v. *Mayor of Bristol* (7).

Mr. *Jessel*, Q.C., and Mr. *Vaughan Hawkins*, for *Trinity College*:—

The only trusts are for education, and the information, so far as it relates to the poor kindred, cannot be supported until the descendants have failed. The trusts of the will have been properly performed, and if there is any doubt as to the meaning of the will, the usage of 200 years must be considered: *Attorney-General* v. *Corporation of Rochester* (8).

(1) 34 Beav. 654.
(2) 5 Beav. 77.
(3) 2 Russ. & My. 717, 749.
(4) 7 Sim. 290.
(5) 2 Keen, 150.
(6) Jac. 381.
(7) 2 Jac. & W. 294, 311.
(8) 5 D. M. & G. 797.

L. C. 1869

ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

Mr. *J. H. Palmer*, Q.C., and Mr. *Bedwell*, for the relator and other descendants claiming under the will, supported the decree:—

If the Colleges accepted these trusts, they must perform them according to the terms of the will, and there is nothing in the will to make it necessary that those who claim the benefit of the charity should become members of either College. There is no declaration of any intention to benefit the Colleges, who are mere trustees, first, for the descendants, and, failing them, for the poor kindred: *Christ's Hospital* v. *Grainger* (1). If this had been a gift to a City company, they could not have confined the charity to members of the company or their children. *Sidney Sussex College* contends that their moiety, at all events, is freed by the statute of the University Commissioners, but the trust is indivisible, and if one moiety is not freed the other cannot be. Moreover, our right to be educated at these Colleges is a beneficial interest under the will, and as such is reserved by the statute.

Mr. *Hemming*, for descendants of the testator's brothers, adopted the arguments of the relators, so far as their interests were identical:—

We do not contend that the second portion of the gift is charitable and not educational, and are content to consider it educational. We do not dispute the right of the Colleges to exercise a large discretion in the administration of the trust. The trust is for the benefit of certain descendants and poor kindred; and if it were possible to exhaust the funds by educating members of that class within the College walls, it might be competent to them to do so; but when this is found impossible, the surplus should go to the education elsewhere of the designated class, and not to the Colleges; and we say that a scheme must be framed accordingly.

Mr. *Wickens*, for the *Attorney-General*.

Mr. *Cole*, in reply, for *Sidney Sussex College*, cited *Incorporated Society* v. *Richards* (2) as to the effect of usage, and *In re Chelmsford Grammar School* (3).

Mr. *Vaughan Hawkins*, in reply, for *Trinity College*.

(1) 1 Mac. & G. 460. (2) 1 D. & War. 253, 294.
(3) 1 K. & J. 543.

Mar. 24. LORD HATHERLEY, L.C.:—

L. C.
1869
ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

The principal point that arises in this case is whether, under the will of *Francis Combe* it was intended that the property devised to these two Colleges should be taken by them upon trust to educate the persons specified by the will in piety and learning, as the Colleges were in the habit and custom of educating those who resorted to them for education; or upon trust to educate ten persons, to be selected out of the whole body of the testator's kindred, whether girls or boys, and to provide for them somewhere, and in some manner, subject to the regulation and direction of this Court, if not under the direction of the Colleges themselves.

I can find no case in which a bequest was worded in a manner precisely similar to this, or so analogous to it as to afford me any useful precedent. I am therefore obliged to consider it principally upon the actual form of the will as the words express, or are intended to express, the testator's meaning, and to come to the best conclusion I can upon the words, regard being had to the time when, and the circumstances under which, the will was made. [His Lordship then commented on the terms of the will, observing that it was very informal, and must have been written at different times, and referring to the bequest of books to the two Colleges as proving an intention to benefit them, and to the directions as to teaching poor children at *Hemel Hempstead* as shewing his regard for education, continued:—] His Lordship the Master of the Rolls seems to have been led in a great measure to the conclusion that this was a general trust for education by the arguments that this is only a gift to the two Colleges—that no place of education is named—that it does not follow necessarily that, because a gift is made to a College, therefore it should be for the purpose of educating there—and that it may have been that the testator selected these two Colleges as other persons have selected, for the purpose of continuous charities, corporate bodies for the administration of charities, without the corporate bodies being called upon in any way to assist in the due administration of the charity, beyond seeing that the trust is executed.

No doubt, there are such cases: as, for instance, the case of the *Incorporated Society* v. *Richards* (1), and the case of *Sonley* v. *Clock-*

(1) 1 D. & War. 258.

L. C. 1869 ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

makers' Company (1), in which a bequest has been made to a corporation entirely for private purposes. But the questions I have to consider are, what was the course of education conducted at these Colleges, and what these words "piety and learning" in particular point to with reference to the Colleges, and with reference to the duties they were performing; and then I have to consider also the remarkable fact that the testator has not merely chosen one corporation for his trustee in order that the trusts may have a perpetual endurance, but has designated two Colleges as trustees for the purposes of his will.

Let us first consider what would be the natural conclusion to be drawn when a person has made a gift for certain purposes to a corporate body which is in the habit of doing that which he wishes to have done. I apprehend (although I have not found a case precisely in point) that the natural conclusion would be, that the objects of the gift should be dealt with in the manner in which the corporate body dealt with all other persons committed to their charge. I will put the case of a gift of a sum of money to one of the corporate bodies in the City of *London*, to be employed in apprenticing young men in the days when apprenticeship was necessary. Surely the first impression would be, that the gift was for apprenticing them in the craft to which the corporate body belonged. Or put the case of a gift by a testator to the corporation of *St. Bartholomew's Hospital* on trust that they should at all times attend to the curing and healing of ten of his sick relations. Could anybody suppose it was not to be done at the hospital, or that the corporation was bound to seek out all over *England* any ten of the testator's relations and treat them wherever they were found?

This subject, as I said before, is almost without authority, although there are certainly some observations made by Lord *St. Leonards* in the case of *Incorporated Society* v. *Richards* (2), to which I would rather refer than rely on my own opinion, when it is in conflict with that of the Master of the Rolls. Lord *St. Leonards* there says that the words of a devise to the *Incorporated Society* in *Dublin*, and their successors for ever, for promoting English Protestant schools in *Ireland*, including as they do the very objects for which the Society was incorporated, appear to

(1) 1 Bro. C. C. 81. (2) 1 D. & W. 258, 294.

imply that the devise was made to the Society in that character, and thereby, as it were, to impress the estate with the charitable purposes for which the Society was created.

Looking, then, to all the circumstances of the case, I find the gift to be to these Colleges; and then I have to inquire, if inquiry be necessary, whether or not those Colleges were then, as now, in the habit of instructing people in piety and learning. Now, I find that the very statute incorporating *Sidney Sussex College* contains those identical words, and that it was incorporated for the express purpose of promoting piety and learning. That is the common expression to be found in the various charters of Colleges in the Universities. Sometimes it is called in sound learning and true religion, sometimes it is called piety and learning; but these are the very objects for which these several bodies seem from the earliest time to have been incorporated, and as far as *Sidney Sussex College* is concerned, they are included in the very words of the charter under which the incorporation is formed.

Finding, therefore, as I do find, a gift to two bodies which were expressly incorporated to inculcate that which the testator desired to inculcate on his descendants, it appears to me that the plain ordinary construction of the gift is to the two Colleges for the purpose of giving to the objects pointed out by the testator's bounty the benefits which the Colleges confer upon all who resort to them for the purpose of instruction.

It appears to me, looking at the whole will, that this must be the plain meaning, and I was undoubtedly startled when I found the will construed as meaning a trust to educate all the testator's descendants, female as well as male, through the medium of those two Colleges. It would have been very surprising if these Colleges had accepted such a gift, and had undertaken to send to proper girls' schools the female descendants of the testator for all time, whereas on the other construction the Colleges have the means of offering all that was intended. I think that I am hardly going so far as Lord *St. Leonards* went in the case of *Incorporated Society* v. *Richards* (1) in holding that this was the original intention of the testator's gift.

(1) 1 D. & War. 258, 294.

L. C. 1869

ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

But the case does not rest there, because I think the Appellants are entitled to apply that principle of the Court which says, that if there be any ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason why the Court relies upon that rule with reference to charities, where there is anything doubtful in the construction of the will, is, that there have been persons alive who were competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such a conclusion, a course of action has been adopted which has been a plain and clear breach of trust. I think the rule cannot be stated better than in the case of *Attorney-General* v. *Mayor of Bristol* (1); but one of the latest cases is *Attorney-General* v. *Corporation of Rochester* (2), where Lord Justice *Turner* also states the rule, though he decided against the usage in that case, as he thought the will was not doubtful.

It is not necessary in this case to come to a conclusion upon these grounds, because enough is derivable from the terms of the will itself; but it appears to me that at the highest there cannot be more said on the other side than that the will might admit of the opposite construction. Then the case in that point of view is extremely strong, because the circumstances were peculiar. The testator appointed several supervisors of his will; one of them was his father-in-law, *Greenhill*, whose descendants were entitled to the benefit of the trust; and yet both the Colleges appear from the first to have adopted the plan of educating those, and those only, who came to be instructed by them. Moreover, *Sidney Sussex College*, in 1646, when some of the supervisors must have been alive, made a resolution, and observed it down to the very latest period, that when any descendant did not come to the College, the funds should go into the general funds of the College, which are not employed for the benefit or behalf of the College itself in any other sense than that they could go for exhibitions and for the purpose of instructing those who needed instruction. That having

(1) 2 Jac. & W. 294, 314. (2) 5 D. M. & G. 797, 822.

been laid down as their rule, *Trinity College* did, as well as *Sidney Sussex College*, act upon the same system. At *Sidney Sussex College* this was laid down as the definite rule, the College always accepting, as I understand it, any who chose to present themselves and claim the benefit down to 1853, but not searching through *England* to find where others might be.

I think, therefore, that I have arrived at what was the intention and understanding of all parties, both of him who gave and of those who accepted the benefit; and so far as that part of the decree is concerned it must be varied.

[As to the bequest to the poor kindred in default of descendants, his Lordship did not think it necessary to make any declaration in the present stage of the proceedings, as none of the poor kindred were before the Court; and it was, moreover, not likely that there would be any default of descendants. His Lordship then continued:—]

I have only one point more to consider, and that is the statute as to *Sidney Sussex College* made by the University Commissioners. The *Cambridge* Commissioners had certainly full power, and had a clear opportunity of distinguishing, as far as the trusts were concerned, any special benefit resulting to any founder's kin, and they have made a special statute on the subject in somewhat singular words. It was contended before Lord Chancellor *Chelmsford*, when this case was before him, that the words "persons beneficially interested" meant only persons interested in the *Abbots Langley* lease, but he was of opinion that it was not so; and if I may be allowed to say so, I entirely agree with him in that view, because it indicates not only, I think, a doubt on the part of the Commissioners as to the question of the *Abbots Langley* lease, but a doubt whether the trust for these poor kindred was not an eleemosynary trust as distinguished from an educational trust. As regards any trust for alms, Lord *Chelmsford* said the Commissioners very properly abstained from dealing with that, because they had no power under the Act to deal with it. Therefore they made this exception (which seems the reasonable construction of their rule), that any beneficial interest of that description must be left untouched; but otherwise they abolished any preference just as they would in any other case. I quite coincide that there is an argument upon it,

L. C. 1869

ATTORNEY GENERAL v. SIDNEY SUSSEX COLLEGE.

because the words "beneficial interest" might include a right to be educated. No doubt that would be a strong argument; but, looking to the subject matter of the ordinance, which is the dealing with the funds appropriated, as far as education goes, to a particular family with regard to which the Commissioners had full power to deal, and did deal in numerous cases, it appears to me that the true construction of the ordinance is that, subject to what might be hereafter said or done with reference to the supposed beneficial interest which persons might take by way of alms, either as to the lease of *Abbots Langley*, or as to poor kindred, the Commissioners made this ordinance as far as regards anything affecting the duty of educating any particular class of persons with regard to this particular fund.

It appears to me, therefore, that *Sidney Sussex College* in that way is free now from any question; but as I think it desirable, even for themselves, that they should not be dismissed without an expression of the opinion of the Court, and after all this inquiry, and after the inquiries as to the parties interested, I have therefore taken the course of staying all further proceedings against them in preference to directing that the information should, as against them, be dismissed.

MINUTES:—Declare that, according to the true construction of the will, the two Colleges became entitled to the property in equal shares as tenants in common, subject to the trust imposed on the said Colleges respectively by the said will of educating in piety and learning, according to the course and usage of instruction in the said Colleges respectively, and according to the regulations and discipline thereof, four of the descendants of the testator's brothers and sisters, three of the descendants of the brother and sister of the first wife, and three of the descendants of the brothers and sister of the second wife, with such limitations over as in the said will appears in default of such descendants. And as it appears that there still exist many of such descendants, and no poor kindred other than such descendants, the inquiry as to poor kindred is not to be prosecuted.

Declare that, pursuant to the statute made by the University Commissioners concerning the foundation of *Sidney Sussex College*, that College is entitled to carry over all rents and profits of their moiety of the trust estates in question to the general funds of the College, to be applied in the manner directed by the statutes of the College, and freed from the charge imposed by the testator's will of educating such persons as in that behalf mentioned. Stay all proceedings in this suit, as all questions raised in this suit may fitly be disposed of in the suit of *Attorney-General* v. *Greenhill*, having regard to these declarations. Decree to be without

prejudice to the rights of poor kindred other than the persons above mentioned. Costs of the appeal out of the funds of the two charities.

L. C.
1869
ATTORNEY-GENERAL v. SIDNEY SUSSEX COLLEGE.

Solicitor for the Informant: Mr. *C. Rivington.*
Solicitors for *Sidney Sussex College:* Messrs. *J. & C. Cole.*
Solicitor for *Trinity College:* Mr. *Philpot.*
Solicitors for other Parties: Messrs. *Fearon & Co.;* Messrs. *Young & Jackson.*

PARDO *v.* BINGHAM

L. C.
1869
Jan. 29; *Feb.* 1.

Statute of Limitations—Retrospective Enactment—Mercantile Law Amendment Act (19 & 20 *Vict. c.* 97), *s.* 10—*Practice—Hearing Creditor on Appeal.*

The 10th section of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), is retrospective; and therefore, even where the cause of action has accrued before the statute was passed, no person is entitled to any time within which to commence an action beyond the time fixed by the *Statute of Limitations*, by reason of such person being beyond the seas when the cause of action accrued.

In an administration suit, where one creditor has appealed against the disallowance of a part of his claim, another creditor will not be allowed to argue, on the hearing of the appeal, against the disallowance of another claim by the same decree.

THIS suit was instituted in 1862 for the administration of the estate of *A. F. Hamilton.* The usual accounts had been directed, and a certificate had been made, from which and from the evidence the following facts appeared as to debts claimed from the estate by one of the creditors:

Dr. *E. E. Duprè* claimed six sums of money as due to him from *A. F. Hamilton,* three of which appeared from the certificate in the suit to have been due before July, 1846, and as to the other three, the certificate left it open whether they were contracted before or after that date. All the debts were contracted in *Venezuela,* where Dr. *Duprè* and *A. F. Hamilton* both resided. There was evidence that Dr. *Duprè* had been in *England* in July, 1846, but none as to when he returned to *Venezuela,* and it seemed to have been assumed that he returned soon after July, 1846, and before the three latter debts were contracted.

The questions as to the validity of these claims by Dr. *Duprè,*

L. C
1869
PARDO
v.
BINGHAM.

and of other claims, including a claim by the representatives of one *Level de Goda* to rank as specialty creditors, were reserved on the certificate for the consideration of the Court, and the Master of the Rolls held that the six debts claimed by Dr. *Duprè* were barred by the *Statute of Limitations*, the question, as argued before him, appearing to be whether the law of *England* or the law of *Venezuela* applied, and also disallowed the claim of the representatives of *Level de Goda*. The case is reported (1).

Dr. *Duprè* appealed.

Mr. *J. Cutler*, for the Appellant:—

We claim the benefit of the saving in the statute 21 Jac. 1, c. 16. That statute enacts, sect. 3, that all actions of debt shall be commenced and sued within six years next after the cause of such actions or suit, but there is a provision in sect. 7, that if any person or persons that shall be entitled to any such action shall be beyond the seas at the time of any such cause of action given or accrued, fallen or come, that then such person or persons shall be at liberty to bring the same action, so as they take the same within such times as were before limited after their being returned from beyond the seas as other persons having no such impediment should have done. It will be contended that our rights have been taken away by the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 10, which enacts, that "No person who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by 21 Jac. 1, c. 16, s. 3, . . . shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas." We say that this section is not retrospective, and does not affect our claim. It has been decided in *Williams* v. *Smith* (2), that sect. 1 is not retrospective; and in *Lockhart* v. *Reilly* (3), that sect. 5 is not retrospective, though *De Wolf* v. *Lindsell* (4) is to the contrary effect. *Thompson* v. *Waithman* (5) is overruled by *Jackson* v. *Woolley* (6). *Flood* v. *Patter-*

(1) Law Rep. 6 Eq. 485.
(2) 2 H. & N. 443.
(3) 1 De G. & J. 464.
(4) Law Rep. 5 Eq. 209.
(5) 3 Drew. 628.
(6) 8 E. & B. 778, 784.

son (1) decides that sect. 12 is not retrospective. The true rule is laid down in *Moon* v. *Durden* (2). *Gregory* v. *Hurrill* (3) was quite different.

Mr. *E. Cutler*, for the executors:—

Cornill v. *Hudson* (4) is an express authority on this point. The same language is used in sect. 14, which has been held to be retrospective: *Cockrell* v. *Sparke* (5). It does not follow that the saving applies when both debtor and creditor are abroad, for then one could have sued the other at any time. The only case like it is *Williams* v. *Jones* (6), and that has been disapproved of.

Mr. *Hemming*, for the representatives of *Level de Goda*, who had not appealed, but were served with the petition of appeal, asked to be heard as to their claim, which had been disallowed:—

We are content with the decree as it stands; but if it is to be altered in one respect against us, by allowing claims which will diminish the estate, then we ask to have it altered in our favour by having our claims allowed. Everything is open on a rehearing: *Kent* v. *Freehold Land Company* (7).

LORD HATHERLEY, L.C.:—

There is no settled rule that, where one party has appealed, any other party may insist on having the decree varied in his favour. In this case the estate is represented, but you come as a creditor, and say that you have a right to be heard. It would be very inconvenient to have 100 creditors all claiming to be heard, and in such a case as this it cannot be allowed.

Mr. *J. Cutler*, in reply, as to Dr. *Dupré's* claim:—

There are many cases in which statutes like this have been held not to be retrospective: *Moon* v. *Durden* (8); *Doe* v. *Page* (9). In fact, the only authority against the Appellant is *Cornill* v. *Hudson*.

(1) 29 Beav. 295. 7 Jur. N.S. 324
(2) 2 Ex. 22, 23.
(3) 5 B. & C. 341.
(4) 8 E. & B. 429. 3 Jur. N.S. 1257
(5) 9 Jur. (N.S.) 307.
(6) 13 East, 439.
(7) Law Rep. 3 Ch. 493.
(8) 2 Ex. 22.
(9) 5 Q. B. 767.

L. C. 1869 ~ PARDO v. BINGHAM. —

The LORD CHANCELLOR said that the case came before him in a very inconvenient manner, and that further inquiry might be necessary. As to the debts incurred before July, 1846, when Dr. *Duprè* appeared to have been in this country, they were clearly barred by the Statute of *James*. His Lordship considered that, though Dr. *Duprè* might never before have been in this country, the statute applied to him; the word "return" in the statute had been decided to mean simply being in *England*, and having an opportunity of suing; and as he had not brought his action within the six years, his claims were barred.

As to debts incurred after July, 1846, unless his Lordship came to the conclusion that sect. 10 of the *Mercantile Law Amendment Act* was retrospective, further inquiry would be necessary as to when Dr. *Duprè* returned to *Venezuela*.

Feb. 1. LORD HATHERLEY, L.C.:—

14 Eq 604

This case has been argued before me upon a point which was not even suggested before the Master of the Rolls, so that, in truth, I have not to reconsider the judgment of the Master of the Rolls, but to decide the case upon a different ground.

As regards the only point affecting the claim of Dr. *Duprè* which appears to have been argued before the Master of the Rolls, I entirely concur with his decision, which is in accordance with the authorities, that a certain period is fixed by the *Statute of Limitations*, which binds everybody who comes to sue before this forum. The argument was, that the longer period which the law allowed in *Venezuela* for the recovery of debts should be extended to the present claimant. As to that, the Master of the Rolls decided the case in the negative, and held that the Plaintiff was not entitled on that account to recover.

One question raised before me was with reference to certain debts which were undoubtedly contracted anterior to the period when the creditor was in *England;* and as to these debts, of course, the statute having begun to run, continued to run, and he is clearly barred from any remedy in this country.

Another question was raised, and argued with great ability, as

to debts which were contracted subsequently to that period, if any such there be. We have a certain finding of debts by the Chief Clerk, the period of which is not yet ascertained, and they may be anterior or subsequent to the year 1846. We have also another element of uncertainty; for though it is shewn that the creditor was here in 1846, and that afterwards he went back to *Venezuela*, it is not shewn when he went back, so that we do not know the exact date of the debt, nor the exact date of his leaving this country. An inquiry would therefore be necessary if I were not to hold the debts to be barred.

The question upon the debts has given me occasion to consider the matter very carefully, because I find decisions upon two sections of the statute, which may seem in some respects to militate the one against the other.

In the first place, we have a decision of Vice-Chancellor *Kindersley* in *Thompson* v. *Waithman* (1), upon the 14th section of the statute, that the statute was retrospective. An analogous case, *Jackson* v. *Woolley*, went before the Court of Queen's Bench (2), and then before the Court of Exchequer Chamber (3), and that Court came to a conclusion contrary to that of the Vice-Chancellor, and held that the 14th section was not retrospective.

On the other hand, there had been a previous decision upon this 10th section by the Court of Queen's Bench, *Cornill* v. *Hudson* (4), the Judges consisting of Lord *Campbell*, Mr. Justice *Coleridge*, Mr. Justice *Erle*, and Mr. Justice *Wightman*, and they held that, as regards the 10th section, the statute was retrospective. That case was not carried further by error, and, as far as I know, has been the ruling authority ever since.

The question is, first, whether there is an inconsistency in holding the 14th section to operate prospectively only, whilst the 10th is to be allowed to act retrospectively; and, secondly, whether on general principles the statute ought, in this particular section, to be held to operate retrospectively, the general rule of law undoubtedly being that, except there be a clear indication either from the subject matter or from the wording of a statute, the statute is not to have a retrospective construction. That rule was laid down strongly

(1) 3 Drew. 628.
(2) 8 E. & B. 778.
(3) 8 E. & B. 784.
(4) Ibid. 423.

L. C. 1869 PARDO v. BINGHAM.

in *Moon* v. *Durden* (1), and the reasons given for the judgment in that case were approved of in *Jackson* v. *Woolley* (2), where it was held that the 14th section was not retrospective. It is remarkable that in the reported judgments in that case there should have been no mention of *Cornill* v. *Hudson* (3), and I have not found any case in which *Cornill* v. *Hudson* has been called in question. The reasons for the decision in that case are certainly very cogent, especially that the statute in some cases would not have any operation for fifty years or more, if it did not extend to persons who were at the time of the passing of the statute residing beyond the seas.

Now, in the very case of *Moon* v. *Durden*, Baron *Parke* did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the Legislature had sufficiently expressed an intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated. In the present case we have a most remarkable instance of what would be the effect of holding that the statute was not retrospective, for the creditor was residing in *Venezuela*, and the debtor was in the same place, and might have been sued there at any time; but the creditor took no proceedings for many years, and now makes this claim.

It appears to me therefore that, looking to the construction of the 10th section, looking at the purport and object of the Legislature as manifested in that section, and looking at the extraordinary length of time which would accrue if persons were allowed an indefinite time for suing until they chose to come to this country, I ought to follow Lord *Campbell* and the other Judges of the Court of Queen's Bench in the case of *Cornill* v. *Hudson*, entirely on the grounds which were assigned by the Lord Chief Justice in that case.

I think there is a considerable difference between this case and a case where the right of action is actually taken away. That is the ground of the decisions in *Moon* v. *Durden* and *Jackson* v. *Woolley*. In each of those cases the person had acquired by posi-

(1) 2 Ex. 23. (2) 8 E. & B. 778. (3) 8 E. & B. 429.

tive act *inter partes*, a right of action, in the latter case by a co-contractor having made a promise, which, of course, the person had a right to rely upon as the law then stood, as giving him a further period of six years for his remedy. And in *Moon* v. *Durden* (1) the person had actually brought an action before the statute passed, and to hold the statute retrospective would have deprived him of a right which he had actually acquired; whereas in this case the creditor has not acquired by any act on the part of the debtor any new or fresh right, but he stands upon that remedy which, according to his view, would extend to him for fifty years, or more, the right to recover against the debtor a debt which he might have proceeded to recover within the six years.

I think it is the sound construction of the 10th section to hold, as in *Cornill* v. *Hudson* (2), that the remedy is barred by the statute. Therefore I am bound to dismiss the appeal with costs.

Solicitors: Messrs. *Cutler & Turner;* Messrs. *Walker, Twyford, & Belward.*

HICKS *v.* POWELL.

Conflict of Laws—Registration—Indian Registration Acts, 1864 *and* 1866—*Lex fori—Lex rei sitæ.*

The *Indian Registration Act*, 1866, makes void all instruments relating to real estate in *India* which ought to have been registered under the *Indian Registration Act*, 1864, but were not so registered, and destroys all equities arising out of them.

A. being resident at *Madras*, in 1865 executed a deed by which he conveyed land in *India* to the Plaintiffs and covenanted for further assurance. The deed was not registered under the *Indian Registration Act*, 1864, which provides that if such a deed be not registered it shall not be received in evidence in any Court in *India*. In 1866 *A.* mortgaged the same land to the Defendants, who had notice of the Plaintiffs' conveyance, and the Defendants registered the mortgage deed under the *Indian Registration Act*, 1866. The Plaintiffs filed a bill to enforce the covenant for further assurance against the Defendants:—

Held (affirming the decision of *Giffard*, V.C.), that the Plaintiffs had no equity against the Defendants, and the bill was dismissed.

Semble that, independently of the operation of the *Indian Registration Act*,

(1) 2 Ex. 22. (2) 8 E. & B. 429.

L. C. 1869 HICKS v. POWELL.

1866, as the Plaintiffs' deed was forbidden by the *Indian Registration Act*, 1864, to be received in evidence in *India*, it could not be sued on in *England* either as a deed of conveyance or as a deed of covenant for further assurance.

THIS was an appeal from a decision of Vice-Chancellor *Giffard*.

Stephen Clark, being then resident at *Madras*, in the *East Indies*, on the 21st of April, 1865, executed a deed whereby he conveyed his interest in a freehold house in *Madras* to the Plaintiffs, *Hastings Wicks* and *Frank de Souza*, in fee, upon trust for sale, and to hold the proceeds for *Clark*. The deed contained a covenant by *Clark* for further assurance in the usual form.

By an indenture of the 24th of April, 1865, made between *Clark* and the other partners of his firm of the first part, the Plaintiffs of the second part, and the creditors of the firm of the third part, the proceeds of the sale of the premises comprised in the last-mentioned indenture were assigned, with other property, to the Plaintiffs upon certain trusts for the benefit of the creditors.

Clark left *India* on account of his health shortly after the execution of the deeds, and, consequently, the deed of the 21st of April, 1865, was never registered in accordance with the 13th section of the *Indian Registration Act*, 1864 (Act No. XVI. of 1864), which enacted that every deed of gift of immoveable property should be registered within twelve months after the date of the deed, and that deeds not so registered should not be received in evidence in any Court in *India* (1).

After *Clark's* return to *England* he executed a mortgage of the

(1) The 13th section was as follows:—"No instrument being a deed of gift of immoveable property, no lease of immoveable property for any period exceeding one year, no instrument (other than a deed of gift or lease as aforesaid) which purports or operates to create, declare, transfer, or extinguish any right, title, or interest, of the value of 100 rupees or upwards, in any immoveable property, and no instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, transfer, or extinction of any right, title, or interest, as above, of such value as aforesaid, in any immoveable property, shall be received in evidence in any civil proceeding in any Court or shall be acted on by any public officer, if such instrument shall have been executed on or after the date on which this Act shall come into operation, and if the property to which such instrument relates shall be situate in any part of *British India* in which this Act is in force, unless the same shall have been registered in the manner and within the time prescribed by this Act."

same premises to the Defendants, *D. Powell* and *D. Powell* the younger, for securing a debt previously due to them. This deed was dated the 7th of August, 1866, and was registered in *India* under the *Indian Registration Act*, 1866 (Act No. xx. of 1866), in September, 1866 (1).

The Defendants had notice of the deed of the 21st of April, 1865, but relied upon the fact that it never had been registered. The Plaintiffs filed the present bill to establish their priority.

The bill prayed specific performance of the covenant for further assurance, and that the Defendants might be ordered to convey to the Plaintiffs.

The Vice-Chancellor was of opinion that the deed was inoperative in *India* under the Act of 1864, and could not be enforced in this country, and accordingly dismissed the bill with costs.

(1) The principal clauses of the *Indian Registration Act*, 1866, which were referred to in the argument, are as follow:—

Sect. 3. "Acts No. XVI. of 1864 and No. IX. of 1865, are hereby repealed, excepting so far as the former Act rescinds other acts or regulations, and except as regards things duly done and penalties incurred under the Acts hereby repealed, or either of them, and all things duly done under the same Acts, or either of them, shall be considered as having been done under this Act."

Sect. 17. "The instruments next hereinafter mentioned shall be registered, provided the property to which they relate shall be situate in a district in which, and provided they shall have been executed on or before the date on which, the said Act No. XVI. of 1864, or this Act, shall have come or shall come into operation; that is to say—

"1. Instruments of gift of immoveable property.

"2. Instruments other than an instrument of gift, which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of 100 rupees and upwards, to or in immoveable property.

"3. Instruments which acknowledge the receipt or payment of any consideration, on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest.

"4. Leases of immoveable property for any term exceeding one year."

Sect. 18 enumerates the instruments the registration of which was optional, mentioning, among others, "covenants."

Sections 22 and 24 provide that instruments must be registered within a period of four months after execution, which may in case of unavoidable delay be extended by the registrar to eight months.

Sect. 49. "No instrument required by sect. 17 to be registered shall be received as evidence in any civil proceeding in any Court, or shall be acted on by any public servant, as defined in the Indian penal code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act."

L. C. 1869 HICKS v. POWELL.

Mr. *Druce*, Q.C., and Mr. *Hemming*, for the Plaintiffs:—

The *Registration Act*, 1864, does not make the deed void, but only affects the power of giving it in evidence in an Indian Court. When it is tendered in evidence in *England* the *lex fori* must prevail. The question is analogous to those which have arisen under the 4th section of the *Statute of Frauds*, where it has been held that a foreign contract upon matters within the section could not be proved in an English Court, although good in the country where it was made: *Leroux* v. *Brown* (1); *Clark* v. *Mullick* (2); *Bain* v. *Whitehaven Railway Company* (3). Even if we cannot give the deed in evidence as a conveyance, we have a right to treat it as a deed of covenant, and to enforce the covenant for further assurance. We could have obliged *Clark* to register the deed under this covenant, and as the Defendants had notice of the deed they were bound by the same equity.

It is contended by the other side that the Act of 1866 was retrospective, and destroyed any right of action which we had before it passed. We deny that it has this retrospective operation; which would be a great hardship on persons in the position of these Plaintiffs; but even if it has, it only puts the deed on the same footing as one executed since the passing of the Act. It is true that the 49th section of the Act of 1866 contains the additional words, that an unregistered deed "shall not affect any property comprised therein," which do not occur in the 13th section of the Act of 1864; but they do not make the deed void; they only make it inoperative *in rem*. It is still operative against *Clark* personally, and those claiming under him: *Courtenay* v. *Williams* (4).

[The LORD CHANCELLOR referred to *Pardo* v. *Bingham* (5).]

Mr. *Kay*, Q.C., and Mr. *Macnaghten*, for the Defendants:—

We had no notice of the second deed, which declared the trusts of the proceeds of sale. The deed of the 21st of April, 1865, on the face of it, was simply a voluntary deed for *Clark's* own benefit: *Wyatt* v. *Barwell* (6); *Chadwick* v. *Turner* (7).

(1) 12 C. B. 801.
(2) 3 Moo. P. C. 252.
(3) 3 H. L. C. 1.
(4) 3 Hare, 539.
(5) Law Rep. 4 Ch. 735.
(6) 19 Ves. 435.
(7) Law Rep. 1 Ch. 310.

With respect to the construction of the Indian Acts, we contend, first, that under the Act of 1864 the deed could not be used in any way so as to affect the property sold. This is, in fact, a suit to enforce a contract with respect to land in *India*, and must, therefore, be governed by the *lex rei sitæ*: *Sheikh Parabdi Sahani* v. *Sheikh Mohammed Hossein* (1). But the case is still clearer when we consider the effect of the Act of 1866, which absolutely repeals the first Act, except as to things duly done under it, which are to be regarded as done under the second Act; but as to all deeds executed since 1864, and left unregistered, they are included in the 49th section, and made absolutely inoperative: *Alves* v. *Hodgson* (2).

Mr. *Druce*, in reply:—

The notice was ample to put the Defendants on inquiry, which would have led to the discovery of the second deed.

Covenants are expressly excepted from the instruments as to which registration is compulsory under the Act of 1866.

LORD HATHERLEY, L.C.:—

Upon every view of this case I find very great difficulty in the way of the Plaintiffs succeeding.

There is great difficulty in understanding how, in the case of a covenant which could not be enforced if the parties were in *India*, a right to sue can arise from the accidental circumstance of the person sought to be charged changing his residence before the institution of the suit. I am asked by the Plaintiffs to displace a title which has been acquired in strict conformity with the *Indian Registration Act*, 1866, to land situate in *India*. The Defendants having taken a mortgage, and duly registered it under the Act, would, if they were in *India*, be entitled to possession of the land, and there would be no possible mode of depriving them of it. In *India*, whether the second Act did or did not abolish all rights previously acquired, the present Plaintiffs could have no rights which they could possibly enforce, because, if they were to endeavour to recover the land, they could only do so either under

(1) Bengal Law Rep. 1 App. Civil, 37. (2) 7 T. R. 241.

L. C. 1869 HICKS v. POWELL.

the conveyance, which they could not produce in evidence, or under the covenant with respect to the land, which they are equally precluded from producing. I may observe that the 16th section in the Act of 1864, which gave an option of registering some deeds affecting land which are not absolutely required to be registered, related only to instruments creating or releasing an interest in land of less value than 100 rupees, and left untouched such a deed as the present.

Therefore, as the matter stood in *India*, irrespective of the Act of 1866, and supposing that the Act of 1864 remained entirely unrepealed, the Plaintiffs could not produce the instrument which contained the covenant, inasmuch as, *ex concessis*, that covenant affected a right to the land. And it would be very strange if, in consequence of this statute not in terms invalidating the instrument, but simply saying that it shall not be given in evidence in any Court in *India*, and shall not be acted upon by any public officer there, the Plaintiffs can obtain rights over real property in *India* which could not be obtained in the Indian Courts merely because the Defendants happen to be found in *England*. I am inclined to think that this is not a mere question of evidence, and that on this first ground, which is that on which the Vice-Chancellor proceeded, the case of the Plaintiffs fails.

However, without resting upon that ground, I think that the Act of 1866 places the matter beyond doubt, for it must be taken entirely to have altered the *status* of the parties, so that if the Plaintiffs under the former Act could have enforced specific performance of the covenant in this country, the Act of 1866 takes away the possibility of any such claim being made in any shape whatever.

If the Act of 1866 had entirely and simply repealed the Act of 1864, there might have been a question whether it was intended to have any retrospective operation, and the leaning of the Court would have been not to interfere with anything that had been done under the former Act. But we find that the 3rd section of the Act of 1866 repeals the Act of 1864, "except so far as it rescinds other acts or regulations, and except as regards things duly done and penalties incurred under the Act hereby repealed, and all things duly done under the same Act shall be considered as

having been done under this Act." And then by the 17th section it enacts that all instruments affecting land (with certain exceptions) "executed after the date on which the Act of 1864, or this Act, shall have come or shall come into operation," shall be registered. Then the 23rd section gives a period of four months for registration, which may be extended to eight months under the 24th section: and the 49th section enacts that no instrument required by sect. 17 to be registered shall be received in evidence, or shall affect any property comprised therein. Therefore the scheme of the Act is this: the Legislature treats all instruments registered under the Act of 1864 as having been registered under the Act of 1866, and as to all instruments which ought to have been registered under the Act of 1864, but were not so registered, it repeals that Act as to them and treats them as void under the 49th section.

In the present case we have the Defendants claiming under a deed which they have duly registered under the Act of 1866, and I am asked to displace them in favour of the Plaintiffs, who claim under an equity arising out of a deed which was liable to be registered under the Act of 1864, but which was not registered, and consequently is not within the saving clause of the Act of 1866. Therefore whatever equity they may have originally had to contend in another country, that the Act of 1864 struck only at the production of their deed in the Courts of *India*, and to insist on the covenant for further assurance, all that equity has been swept away by the Act of 1866. The Legislature have said that the Act of 1866 is henceforth to be the governing Act for the registration of deeds, that the Act of 1864 is to be entirely repealed except as to what has been duly done under it, and that they care nothing for the titles or equities of those who have not proceeded in compliance with that Act.

I am far from saying that I disagree with the Vice-Chancellor as to the construction of the first Act, but I do not think it necessary to rest on that. Upon the ground of the second Act, it is quite clear that the appeal fails, and must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Chilton, Burton, & Co.*

Solicitors for the Defendants: Messrs. *Uptons, Johnson, & Upton.*

L. C.
and L. J. G.

1869

July 28
Aug. 5

In re CORK AND YOUGHAL RAILWAY COMPANY.

Lloyd's Bonds—Penalties—Illegality—7 & 8 Vict. c. 85, *s.* 19—*Costs.*

The holders of instruments under the seal of a Railway Company given with the knowledge of the shareholders, and acknowledging sums of money to be due from the Company (called *Lloyd's* bonds), have, notwithstanding 7 & 8 Vict. c. 85, s. 19, which imposes penalties on a company for giving loan-notes or securities, a valid claim against the assets of the Company for those sums of money so far as the Company had the benefit of the sums of money in respect of which the instruments were given.

Where a penalty is imposed by an Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act.

When an order is varied on appeal, the costs of the appeal will not be allowed to the Appellant merely because his is a representative case.

Order of *Malins*, V.C., affirmed with a variation.

THIS was an appeal from an order of the Vice-Chancellor *Malins*, the question raised being as to the validity of bonds in the form called *Lloyd's* bonds, given by the *Cork and Youghal Railway Company*.

The *Cork and Youghal Railway Company* was incorporated by Act of Parliament, and empowered by several Acts to raise altogether £365,000 by shares, and to borrow altogether £131,000 upon mortgage or bond.

In April, 1861, the Company had borrowed from *David Leopold Lewis*, who was called the financial agent of the Company, sums of money amounting to £25,534, which had been received by the Company and applied by them partly in payment to contractors, partly in payment for rolling stock and other goods, partly in payment of interest, partly in payment of the salaries of the officers of the Company, and partly in payment for land. For the advances so made *Lewis* drew bills upon the Company at short dates, which he from time to time procured to be discounted and again renewed by the Company, charging a commission upon each renewal. The Company afterwards borrowed further sums from *Lewis*, for which he drew bills in the same manner as before. In June, 1862, the whole of the share capital of the Company (except £7435 which was soon afterwards raised) had been raised

and spent; the Company had issued mortgages for the whole of the £131,000 which they were empowered to raise; the advances made by *Lewis* to the Company amounted to £101,149, and the railway was not completed.

In August, 1862, *Lewis* represented to the directors that he had great difficulties in renewing the Company's bills, and that if the Company would issue to him bonds in the form called *Lloyd's* bonds he would be able to raise money upon them with greater facility and would be able to supply the Company with funds. At the half-yearly meeting of the Company, held in August, 1862, a statement of accounts was read and adopted, shewing that the Company had then spent £109,520 beyond the amount authorized to be raised by the Acts; and resolutions were passed to the effect that, as the Company had obtained from *Lewis* large sums of money to pay for land, rolling stock, and the construction of the line, the directors were authorized to issue bonds to be given to *Lewis* as security for the debt due to him.

The directors accordingly issued and gave to *Lewis* bonds for various sums, amounting in the whole to £120,000, the bonds being in the following form:—

"*Cork and Youghal Railway.*

No. 456B. Bond. £1000.

"Know all men by these presents, that we, the *Cork and Youghal Railway Company*, are held and firmly bound unto *David Leopold Lewis*, of No. 11, *George Yard, Lombard Street, London*, Esq., in the sum of £1000, to be paid to the said *David Leopold Lewis*, his certain attorney, executors, administrators, or assigns, on the 20th day of August, 1865, with lawful interest thereon at 5 per cent. per annum from the date hereof until payment, for which payment we hereby bind ourselves and our successors this 20th day of August, 1864.

"Whereas the above-bounden Company is justly and truly indebted to the above-named *D. L. Lewis* in the sum of £1000 for work done and goods and material supplied to the said Company for the purposes of their undertaking, by the means and procurement and at the cost of the said *D. L. Lewis*, and at the request of the Company, as they hereby acknowledge. And whereas the said *D. L. Lewis* hath applied to the said Company for payment of

L. C. and L. J. G.

1869

In re CORK AND YOUGHAL RAILWAY CO.

the said sum of money, but hath, at the request of the said Company, agreed to forbear payment of the same until the 20th day of August, 1865, on the said Company becoming bound by this application for securing payment of the said principal sum on the day last aforesaid. Now, therefore, the condition of this obligation is, that if the said *Cork and Youghal Railway Company*, their successors or assigns, do and shall pay to the said *D. L. Lewis*, his executors, administrators, and assigns, the said sum of £1000 on or before the said 20th day of August, 1865, and do and shall pay interest thereon at the rate of £5 per cent. per annum until payment, such interest to be paid half-yearly, the first payment to be made at the expiration of six calendar months from the date hereof, and for any fraction of a half-year to be paid on the day of payment of the said principal sum, then the above obligation to be void, otherwise to remain in full force and effect.

"Given under the common seal of the said Company the 20th day of August, 1864."

Meetings of the directors were held from time to time, and at most of the meetings the further liabilities of the Company were represented to the directors by the secretary, and resolutions were passed requesting Mr. *Lewis* to provide for the same. The money appeared to have been required for different purposes connected with the railway, and in two instances at least *Lewis* was requested to find the money required for the payment of specific debts due from the Company to contractors. Further bonds were delivered to *Lewis*, on account of the loans made by him, to the amount of £45,000, making a total of £165,000, and this was stated at a meeting of the shareholders held in February, 1863. From time to time when the bonds became due they were returned, and new bonds were issued in their place. Further sums were advanced by *Lewis*, and the same course of proceeding was followed until March, 1865, when *Lewis* became bankrupt. In the meantime *Lewis* had deposited bonds with different persons in order to raise money on them, and ultimately it appeared that he had so deposited bonds to the amount of £224,000, and himself held bonds to the amount of £145,000.

It appeared that the Company always employed their own contractors, and that *Lewis* never entered into any contracts on behalf

of the Company, but that in two instances the specific sums advanced by him had been at once paid to creditors, and that in other instances he had advanced sums to meet specified debts.

By an Act, 29 & 30 Vict. c. cxxiv., after reciting that the Company might have incurred debts to a considerable amount beyond their mortgage debt, which they had not the means of paying, and that it would be of advantage to the public that the Company's railway should be sold to the *Great Southern and Western Railway Company*, and that the Company were desirous that their affairs should be wound up and they be dissolved, and that the purchasing Company were willing to purchase the railway for a sum of £310,000 of the ordinary stock of the purchasing Company, and that claims had been made on the selling Company by persons who alleged that they were creditors of the Company, the validity of whose claims was denied by the Company, and it was expedient that provision be made for ascertaining whether and how far the claims against the Company were valid or not,—it was enacted that, in consideration of £310,000 ordinary stock of the purchasing Company, the undertaking, works, &c., of the selling Company should be vested in the purchasing Company, freed from all debts of the selling Company. Provisions were then made for winding up the selling Company, and for the appointment of an official liquidator, who should administer the £310,000 stock. And it was enacted by sect. 12, that "the net proceeds of the sale of the stock shall be applied, with the sanction of the Court, by the official liquidator as follows; that is to say:—

"First. In payment of the costs of this Act by this Act provided to be paid by the Company.

"Secondly. In payment of the compensation and expenses for completing, whether in the name of the Company or in the name of the purchasing Company, the purchases of lands taken by the Company, and of all sums which may be found due from the Company with relation to lands for the taking of which notice has been given by the Company.

"Thirdly. In payment of the principal and interest lawfully due on the mortgages of the Company lawfully created under the powers of the Company's Acts, and according to their respective rights and priorities as existing on the 1st day of January, 1866.

L. C. and L. J. G.
1869
In re Cork and Youghal Railway Co.

"Fourthly. In payment of the costs, charges, and expenses incurred by the Company after the 15th day of March, 1865, in and about actions and suits and legal proceedings against them, and the negotiations between them and the purchasing Company with respect to the arrangement effected by this Act, and also in payment of the necessary office expenses, salaries, and wages due at the time of such payment.

"Fifthly. The surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the property would, in case this Act had not been passed, have been subject, and shall be applied accordingly."

The sale to the *Great Southern and Western Railway Company* was completed, and the £310,000 stock was transferred to the official liquidator, of which, after the payments directed by the first four clauses of the 12th section of the Act, £150,000 remained.

The official liquidator of *Overend, Gurney, & Co., Limited*, claimed the benefit of this surplus in respect of bonds for £191,000 held by that company, and the official liquidator of the *London, Hamburg, and Continental Exchange Bank, Limited*, claimed in respect of bonds for £40,000. Vice-Chancellor *Malins*, before whom the applications came, made a declaration that so much of the moneys advanced by *D. L. Lewis* as was secured by *Lloyd's* bonds, and applied for the benefit of the *Cork and Youghal Railway Company*, constituted a debt in equity, and was payable out of the assets of the Company before any of the shareholders took any part of the surplus; and His Honour directed an inquiry how much (if any) of the money purported to have been advanced by *Lewis*, and to be secured by the bonds, was applied for the benefit of the company: and directed the costs of all parties to be taxed and paid by the official liquidator of the railway company (1).

(1) 1869. May 31.
Sir R. Malins, V.C.:—

His Honour, after stating the facts of the case, and the provisions of the Acts of Parliament relating to the Company, and observing that the last Act in its recitals recognised the existence of debts due by the Company beyond the amount authorized to be raised, said that in 1862 the Company had expended all their money, and were in possession of an unfinished railway—a thing which was perfectly useless. Probably at that time any shareholder

Mr. *H. R. Pick*, a first-class preference shareholder in the Railway Company (who had liberty to attend on behalf of himself and other preference shareholders) appealed.

---

might have filed a bill and have restrained the directors from raising and expending any more money, but no shareholder did so, nor was it likely that any one would act in such a foolish manner. It was, of course, more for the benefit of the shareholders that the directors should, if they could, borrow money, and there was no justice in saying that those whose money was applied in the purchase of rails, &c., should not be paid, whilst the shareholders took the benefit of the expenditure. Moreover, the shareholders in a public company must be taken to know something of their own affairs, and to be aware that in 1862 all the capital was exhausted, and that all the subsequent expenditure was by means of credit, and to His Honour's mind it was immaterial whether that credit was obtained for rails, locomotives, &c., or for money borrowed and applied in the purchase of such things.

If the money had been expended for the benefit of the Company, it was not the doctrine of this Court that the shareholders could take possession of the property of the Company without fulfilling the obligations which arose out of such an expenditure, and it was admitted that some of these bonds, at all events, were given for money so expended. The shareholders had, besides, express notice of what was going on, as they had stood by and seen this money expended in the completion of their railway, and it would be opposed to every principle of honesty to allow the shareholders now to take the benefit of the expenditure without repaying the persons who had advanced the money. If there were no authorities on the subject, His Honour would not hesitate to decide that the debts must be paid before the shareholders could receive anything. The case of *Chambers* v. *Manchester and Milford Railway Company* (5 B. & S. 588)(1) involved a dry question of law merely, and there is a material difference between law and equity in these questions, as appeared from the case of the *German Mining Company* (4 D. M. & G. 19)(2) and also from the observations of the learned Judges in *Chambers* v. *Manchester and Milford Railway Company*. The only case relied upon was that of the *Worcestershire Corn Exchange* (3 D. M. & G. 180)(3) but there the shareholders were called upon personally to pay double the amount of the subscribed capital, and the case was decided on that ground alone. These were the only cases which were relied upon in favour of the shareholders. But on the other side were the *German Mining Company's Case*, which was particularly strong, and also *Troup's Case* (29 Beav. 353)(4) and *Hoare's Case* (30 Beav. 225)(4) The two last cases were directly in point, and His Honour was convinced that the decisions were consonant with justice, and with the principles of the Courts of Equity. The case of the *Magdalena Steam Navigation Company* (Joh. 690)(5) was still stronger. There, as in this case, the shareholders had an opportunity of ascertaining the facts, and could not be allowed to turn round and insist upon the illegality of the transaction. This money, therefore, having been expended, with the full knowledge and acquiescence of the shareholders, for the benefit of the Company, constituted a debt of the

(1) 5 C. B. N. S. 721
(2) 4 D. M. & G. N. S. 901
(3) 10 Jur. N. S. 765
(4) 2 K. & J. 745
(5) 6 Jur. N. S. 975

L. C. and L. J. G.

1869

In re Cork and Youghal Railway Co.

Mr. *Jessel*, Q.C., and Mr. *Higgins*, for the Appellant:—

These bonds were unauthorized and illegal, and are void, and the resolutions passed at the meetings of shareholders were *ultrà vires*, and cannot legalize the bonds. They were not given to creditors, but to *Lewis*, in order that he might discount them and raise money: *Chambers* v. *Manchester and Milford Railway Company* (1). The directors of a railway company are not like the managing partners of a firm, but are under the restrictions of their Act, and if people choose to deal with the directors or the company under such circumstances, they cannot get more than the Act gives them. *In re German Mining Company* (2) only decides that an ordinary company is liable to pay the debts contracted by the manager. In *Hoare's Case* (3) and *Troup's Case* (4) the Master of the Rolls thought that he was bound by the case of the *German Mining Company*, but there is a clear distinction between paying debts and borrowing money. Moreover, this case is governed by 7 & 8 Vict. c. 85, s. 19, which contains an express provision to prevent a company from being buried under loans. That section provides that "from and after the passing of this Act any railway company issuing any loan-note, or other negotiable or assignable instrument purporting to bind the company as a legal security for money advanced to the said railway company otherwise than under the provisions of some Act or Acts of Parliament authorizing the said railway company to raise such money and to issue such security, shall for every such offence forfeit to Her Majesty a sum equal to the sum for which such loan-note or other instrument purports to be such security." Whatever may be the form of these bonds, it is clear that they are securities, and, as such, are void under this section, independently of any other invalidity.

Mr. *Jackson*, for a judgment-creditor.

Company, not personally as against the shareholders, but as against the property of the Company, and no shareholder could take any portion of the property until the debt had been paid. The arguments that a company could not bind itself by bills of exchange, and could not borrow without legal powers, might be available in a Court of Law, but were totally beside the question in this Court.

(1) 5 B. & S. 588.
(2) 4 D. M. & G. 19.
(3) 30 Beav. 225.
(4) 29 Ibid. 353.

Mr. *Roxburgh*, Q.C., and Mr. *Lindley*, for *Overend, Gurney, & Co.*:—

The railway was completed with our money, and then sold, so that the money in Court has actually come from our advances, and now the shareholders wish to avoid paying us. The shareholders were aware of everything: *Jenner* v. *Morris* (1). The Act of 7 & 8 Vict. does not prohibit the borrowing of money, and there is not and could not be any law to prevent a company from incurring debts. Our money has been employed in paying creditors, and we ask to stand in the same position as the creditors: *In re Magdalena Steam Navigation Company* (2).

The shareholders knew quite well in 1862 that all their money had been spent, that the line remained unfinished, that large sums were then due to *Lewis* and other creditors, and that further debts must be incurred before the railway could be finished. All this money was actually raised and paid by *Lewis*, and if he had taken assignments of the debts, our claim would have been indisputable; but the assignment of a debt is a mere form, and we are entitled to stand in the same position as if the debts had been assigned. No one ever doubted that a creditor might recover against a company for work done, and we stand in the shoes of the creditor. So far as the money raised on these bonds was applied in payment of creditors, we must be repaid.

Mr. *Cotton*, Q.C., and Mr. *Graham Hastings*, for the *London, Hamburg, &c. Bank*:—

The Company and its bankers became mere conduits between *Lewis* and the contractors. In some cases he actually paid creditors, and in others it appears that the money advanced by him went directly to the creditors. No doubt we cannot sue at law, but that is merely because the debts have not been assigned, and the shareholders can never be allowed to take advantage of that omission and share our money. The word "illegal" has been erroneously used; it may mean either prohibited by law, or merely not authorized by law. If the other side are right, creditors could not recover against a company, even when the company was earning

(1) 1 Dr. & Sm. 218; 3 D. F. & J. 45.

(2) Joh. 690.

L. C. and L. J. G.

1869

In re Cork and Youghal Railway Co.

profits. If, then, the Company could incur a reasonable debt, they surely could acknowledge it, and they have done so under seal. If they are estopped by their seal there is an end of the case; if they are not estopped, then they have made a false representation, and by repaying us our money must put us in the same position as if it had not been made.

Mr. *Pearson*, Q.C., and Mr. *Waller*, for the official liquidator of the Railway Company.

Mr. *Jessel*, in reply:—

These claimants do not come here simply as holders of the bonds. They do not attempt to say that they were ignorant of the mode in which the bonds were issued. It was held in *Chambers* v. *Milford and Manchester Railway Company* (1) that shareholders are not bound by a false representation made by the directors of a company, and if the directors act *ultrà vires* the shareholders are not bound. Where directors have issued duplicate debentures the company has never been bound. We are preference shareholders, and advanced our money on the faith of an Act of Parliament, which limited the borrowing powers of the Company. These bonds were merely given to raise money upon, and in only a few instances does it appear that the money was applied in payment of outstanding debts. The bills were clearly bad, and these bonds were, in many cases, given to meet them. *Lewis* had already advanced the money: then these bonds were given to him by means of which he raised money and repaid himself; but that is not paying creditors. The directors have made no misrepresentation, but have borrowed when they had no power to borrow. These bonds are clearly securities within the provisions of 7 & 8 Vict. c. 85, and, as such, are void. It is not true that the shareholders could not have got any benefit from the railway unless this money had been advanced; they had the railway, and it might have been sold or completed by other money; and why are they to lose all?

Lord Hatherley, L.C.:—

It appears to the Lord Justice and myself that the order, as it now stands, is not exactly the order which the exigencies of the

(1) 5 B. & S. 588.

case require, but that, on the other hand, it would be most improper to hold that under and by virtue of the 12th section of the Act by which this Company has been put an end to, and has been, in effect, bought by another Company, the money should be distributed to the shareholders without making any provision whatever in respect of the payments that have been made by moneys procured from Mr. *Lewis*. The transaction was, no doubt, of an irregular character. The Company having expended the whole of its capital, and reached the extent of its borrowing powers, found itself heavily embarrassed with debts, many of which appear to have been legally payable, being due to contractors and others for rolling stock and so forth, and these debts the Company had not the means of paying. A contention has been raised by Mr. *Jessel*, against which it may not be necessary to decide on the present occasion, but it is one which, I conceive, would not be sustainable. He contends that when a railway company is formed with a certain amount of capital, and is authorized to execute certain works, then, unless the works can be executed with exactly the prescribed amount of capital, no further work can be done at all; in other words, that no contractor who has entered into an engagement to make the two or three miles of line required for the purpose of completing the work, would be able to recover in respect of the money, labour, and work expended by him on the company's behalf. That, I apprehend, would not be law, and the very point did arise in the case of *White* v. *Carmarthen Railway Company* (1), which, as far as I recollect, was not appealed from. There a contractor was willing to give his services, and to take his chance of being paid, with such remedies as he could insist upon by bringing an action against the company and recovering judgment. In that case I held that the company were authorized in giving him a bond acknowledging the amount of the debt. On the other hand, it is equally clear, or it has been made clear if it was not clear before, by the case of *Chambers* v. *Manchester and Milford Railway Company* (2), and the very able and lucid judgments there given, that where a company is authorized only to raise a given amount of capital by shares, and a certain other sum by debentures or mortgages, then the company cannot issue any

(1) 1 H. & M. 786. (2) 5 B. & S. 588.

L. C. and L. J. G.

1869

In re Cork and Youghal Railway Co.

debenture or loan-note, or any security of that description, for the mere purpose of raising money, and I apprehend that any such instrument so issued would be just as void in equity as at law, being contrary altogether to and absolutely forbidden by statute. And I entirely adopt the view which was taken by the learned Judges in that case, that everything in respect of which a penalty is imposed by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever. Accordingly they held that the bonds in that case, called *Lloyd's* bonds, were not, in effect, issued in respect of debts actually due, but were simply issued for the purpose of raising money, and were instruments to which no legal validity could be attributed; nor, as I apprehend, could any validity be given to them in this Court any more than in a Court of Law. The learned Judges there proceeded upon this ground, that the Act 7 & 8 Vict. c. 85, whilst it preserved the rights of those who at that time had advanced money to railway companies on the security of loan-notes or other instruments, proceeded to enact that from and after the passing of that Act, any railway company issuing any loan-note, or other negotiable or assignable instrument purporting to bind the company, as a legal security for money advanced to the railway company otherwise than under the provisions of some Act or Acts of Parliament authorizing the railway company to raise such money and to issue such security, should for that offence forfeit a certain sum of money. The Judges held that the penalty imposed by that Act indicated plainly that the course of procedure in respect of which the penalty was imposed was forbidden by law, and that therefore no recovery could be had upon any such instrument in a Court of Law. Of course I need hardly say that if a thing be forbidden expressly by Act of Parliament, that Act can no more be contravened by this Court than by any other Court of judicature in the kingdom.

In that case a distinction is drawn by Mr. Justice *Blackburn* which appears to me to be very plain and clear. He says (1) that these instruments "are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instrument may be useful in this way—when a company are indebted

(1) 5 B. & S. 611.

it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the *onus* of shewing the non-existence of the debt; but if there be no debt existing, such an instrument cannot create one, nor put the assignee in a better position than the original obligee or covenantee, and the person holding it could not recover upon it if it were shewn that it were given gratuitously, or was not authorized by statute."

That being the state of the law, we have to consider the circumstances of this particular case. It is shewn, I think, that as regards some of the moneys which have been raised through the medium of Mr. *Lewis*, some small portions were paid directly to persons who were actual creditors of the Company, and so far, I apprehend, there could be little or no dispute as to the right of Mr. *Lewis*, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid.

But with regard to the other debts, they seem to stand in this position:—As far as we can see, there were debts for which the Company was liable; these debts having to be paid, and the shareholders, in truth, having full and distinct notice that there were these debts, and that there was a large sum to be provided for, the directors proceeded to issue the bonds in question, sanctioned, so far as it could be done, by the shareholders. I do not think that the direct and special sanction of the Company, such as there would be at meetings, would have much to do with the matter, because it would rather depend upon the acquiescence of the Company in the steps taken, and the benefit which they derived from the money raised, than upon any direct sanction which they could give to that which was otherwise beyond the powers of the directors.

It appears that *Lewis* found the money from time to time for the Company, first of all by means of bills, and then by these bonds. He stated that he should find greater facilities in raising money by way of bonds, and he was accordingly furnished with these instruments, acknowledging that money was due to him for work and labour done, and with them he raised money. The money, it is said, was applied first of all in paying off bills, and not directly in paying off the particular debts due to *Lewis*, but the bills

L. C. and L. J. G. 1869 ~~ *In re* CORK AND YOUGHAL RAILWAY CO. ——

which had been given in respect of debts, or some of them. Then other bonds appear to have been given to pay off those bonds which had been so applied in paying off the bills, until, ultimately, we reach the set of bonds which are in the hands of the present holders.

Then comes the question, whether the present holders can be said to be entitled, under any circumstances, to claim payment upon these bonds. Now, first, it was said by Mr. *Jessel* that, taking these bonds at the best as a chose in action, even taking them to be that which they really are, a mere acknowledgment of a debt due apparently on a legitimate ground, those who took them must be exactly in the same condition as Mr. *Lewis*, the original holder, was in; and, therefore, if Mr. *Lewis*, the original holder, could not recover, on account of the position in which he was placed, with a full knowledge of all the circumstances, and of the manner in which the company had proceeded for the purpose of raising money, then no more could the holders of these choses in action be able to recover, nor could they be entitled to place themselves in a better position than he was in. That would be so if, as between Mr. *Lewis* and the Company, there were really no debt at all, or that this was all a mere sham, and that the directors had not in any way borrowed the money, or authorized the borrowing of the money, and had not been in any way parties to the transaction, or that the Company had been in no way parties to the transaction. But if the money was really applied for the legitimate benefit of the Company, can it be possible that the Company can hold this money as a surplus which is directed to be paid to them under the Act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. *Lewis*, as being a person to whom money was owing for the legitimate purposes of the Company. And the money having been *de facto* so applied to the legitimate purposes of the Company, is it possible that the Company should be allowed to derive the benefit of all the expenditure which has

been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, "It is true that the debts have been cleared off by means of your money, but you are not the persons who have cleared them off, and you are not to receive the benefit of it, for we are the persons to receive the benefit?" The proper course to be taken seems to me to be this: that, so far as the Company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which, no doubt, have not actually been assigned, but it has been represented by the directors that the persons who lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact, that they were to be put in the position of assignees of the debts.

Therefore what we propose to do is to make this order: Let the order of the Vice-Chancellor be varied, and—Declare that the receipt and expenditure by the directors of the Company, in payment of any sums recoverable from the Company of moneys advanced on or procured by means of the deposit of the alleged bonds, was *pro tanto* an adoption by the Company of the transactions; and, having regard to the representations contained in the alleged bonds, the moneys so expended constituted debts owing from the Company. Inquire whether the Company had the benefit of any, and what, expenditure in payment of any sums recoverable from the Company of any, and what, sums advanced on, or procured by means of, any, and which, of the deposits of the alleged bonds, and whether any, and which, of the sums so expended still remain unpaid by the Company. The costs to be as in the original order. No costs of this application, except that the official liquidator will take his costs out of the estate.

Sir G. M. Giffard, L.J.:—

I think it of importance to state clearly in this case that it is not intended by the Court to throw the slightest doubt on the

L. C. and L. J. G. 1869 *In re* Cork and Youghal Railway Co.

decision come to in the case of *Chambers* v. *Manchester and Milford Railway Company* (1), and, from the course which the matter took in the Court below, I think it is also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a Court of Law by reason of its illegality, can, nevertheless, be enforced in equity, because money has been paid and received in respect of that contract. Equitable terms can be imposed on a Plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of Equity as it is in a Court of Law; and it is for that reason, among others, that the declaration made by the Court below has been varied.

Now, as regards the present case, I am of opinion that the evidence was quite sufficient to throw on the Company the *onus* of proof that there was fraud; but there has been no attempt to give evidence of fraud.

That being so, what the case amounts to is this:—Documents were given under the seal of the Company. Those documents represented that the Company was indebted to Mr. *David Leopold Lewis* in the amount there stated; they were given for the purpose of being deposited by him as security for advances to be made; and if the representations in them had been true, those who advanced their money on the deposit would have been assignees of the debts actually owing from the Company to *Lewis*, and the transaction would have been perfectly legal.

Now, in this case the representations in the alleged bonds are either true or false, or partly true and partly false. In so far as they are true the transactions are legitimate, for Mr. *Lewis* could assign his debt or debts. On the other hand, in so far as they are false, there was fraud on the part of the directors of the Company. The representations on the face of the alleged bonds purported to be representations by the Company, and induced the loans, and were made in order that the loans might be obtained. In so far, therefore, as the Company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the

(1) 5 B. & S. 588.

transaction. It cannot be heard to say the contrary, and to that extent must be held liable. For these reasons I concur in the order which the Lord Chancellor has read.

Mr. *Jessel* applied for his costs of the appeal, as his client represented a class, and had been selected in order to obtain a decision, which was absolutely necessary for the administration of the estate.

Their Lordships refused to give the costs, as the appeal had only succeeded in part.

Solicitor for the Shareholders in the Railway Company: Mr. *Alfred Jones.*

Solicitors for *Overend, Gurney, & Co.:* Messrs. *Young, Jones, & Co.*

Solicitors for the *London, Hamburg, &c. Bank:* Messrs. *Deane & Chubb.*

Solicitors for other parties: Messrs. *Stevens, Wilkinson, and Harries.* Messrs. *Wansey & Bowen.*

L. J. G.
1869
July 16.

BROWN *v.* ADAMS.

Bankers' Account—Following Trust Fund—Appropriation of Payments—Solicitor.

A solicitor being entrusted with £5000 belonging to the Plaintiff, his client, for the purpose of investing it on mortgage, paid it to his general account at his bankers, and never applied it to the purpose intended. Before his death, which happened about eighteen months afterwards, the solicitor drew out various sums exceeding the sum of £5000, together with the balance previously standing to his credit, and also paid in considerable sums, so that the balance at the time of his death standing to his credit was £2700. The Plaintiff filed a bill against his administrator claiming the balance at the bankers as trust money, and moved for an injunction to restrain the administrator and the bankers from dealing with the fund.

Held (reversing the decision of *James*, V.C.), that the sums drawn out by the solicitor must be appropriated to the sums paid to his credit in the order in which they had been paid in, and the injunction was refused.

Pennell v. *Deffell* (1) considered.

THIS was an appeal from an order of Vice-Chancellor *James*.

William Hale, late a solicitor at *Bristol*, acted professionally for the Plaintiff, *Sarah Brown*, as well as for her late husband. On the 29th of October, 1868, the Plaintiff entrusted *Hale* with a sum of £5000 that he might invest it on mortgage of an estate in *Wales*, which he said he had found for her. She paid him this sum by a cheque, which *Hale* sent to his bankers, Messrs. *Drummond*, accompanied by a letter, in which he simply requested them "to place it to his credit." Messrs. *Drummond* accordingly placed the sum to his general account.

The money was never invested by *Hale*, but drawn out as occasion required and appropriated to his own use. He died in May, 1869, and the Defendant, *T. C. Adams*, one of his creditors, took out administration to his estate.

The present bill was filed against *Adams* and Messrs. *Drummond*, alleging that the sum of £5000 was still standing to the credit of the account of *William Hale*, and praying that *Adams* might be declared a trustee of it, and that the Defendants might be restrained from drawing or parting with that sum.

The Defendant, *Adams*, made an affidavit in which he said that

(1) 4 D. M. & G. 372.

he had inspected the bankers' account, the result of which he stated to be as follows:—

"From such account it appears that the balance which, on the morning of the 29th of October, 1868, was standing to the credit of the said *William Hale* upon his said account, was the sum of £4063 7*s.* 1*d.*, and that only £1 16*s.* 10*d.* was drawn out on that day, but that since such sum of £5000 was paid into the said bank as aforesaid, various sums in small and large sums, amounting together to very much more than £5000, namely, to the sum of £18,847 4*s.* 4*d.*, excluding the said sum of £1 16*s.* 10*d.*, were drawn out by the said *W. Hale*, for his own purposes; and further sums in large and small sums, amounting together to the sum of £12,533 11*s.* 6*d.*, excluding the said sum of £5000, have been received by the said Messrs. *Drummond* to the credit of the said banking account, so that at the date of the decease of the said *William Hale*, there was standing to the credit of the said banking account the sum of £2747 17*s.* 5*d.* sterling, and the said sum of £5000 so paid to his account as aforesaid did not consist of or comprise any part of the said sum."

The Plaintiff having moved for an injunction, the Vice-Chancellor made an order that the Defendant, *Adams*, might be restrained from drawing out the balance standing to the credit of the account till the hearing or further order; with liberty to Messrs. *Drummond* to move to pay the balance into Court in another suit which had been instituted for the general administration of *Hale's* estate. The Defendant, *Adams*, appealed from this order.

Mr. *Kay*, Q.C., and Mr. *Roberts*, for the Appellant:—

The bill is founded on a statement that the sum of £5000 still remains standing at Messrs. *Drummond's;* but that is not the case. The sum in question was paid in to *Hale's* general account, and his drawings not being specifically appropriated to any account, the ordinary rule must apply, and the earlier drawings must be appropriated to the earlier payments to that account. If that is done it will appear that the £5000 was drawn out long before the death of *Hale*. *Clayton's Case* (1): *Pennell* v. *Deffell* (2): *Frith* v. *Cartland* (3).

(1) 1 Mer. 572. (2) 4 D. M. & G. 372. (3) 2 H. & M. 417.

L. J. G. 1869 BROWN v. ADAMS.

Mr. *Willcock*, Q.C., and Mr. *C. Browne*, for the Plaintiff:—

The injunction was granted simply to protect the fund *pendente lite*. There is no evidence at the present stage of the suit of the circumstances under which *Hale* drew the various sums which were drawn before his death. The case ought, therefore, to be considered as if the trustee had done what he ought to have done—namely, to have kept the £5000 as a separate account. So long as any part of the trust fund remains, it must be taken that all the sums drawn out by *Hale* were from his own money. When his own was exhausted, the trust fund would of course be applicable. And even if he had drawn out some of the trust fund and then paid in money of his own, it must be taken to have been paid for the purpose of repairing the breach of trust: *Lord Chedworth* v. *Edwards* (1); *Lupton* v. *White* (2); *Taylor* v. *Plumer* (3). Some of the observations of Lord Justice *Knight Bruce* in *Pennell* v. *Deffell* (4) are in our favour, especially where his Lordship says (5): "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained."

SIR G. M. GIFFARD, L.J.:—

If I had the least expectation that by continuing this injunction I should enable the Plaintiff to make a better case at the hearing, I would not hesitate to give her that advantage. But I cannot doubt but that the case is now as good as it can be made. I assume in her favour, for the present argument, that this sum of £5000 ought not to have been drawn out by *Hale* for his own purposes. The result of the evidence is as follows:—*Hale* had an account of his own at Messrs. *Drummond's*, and this sum was paid to his general account on the 29th of October, 1868. After that the account goes on in the ordinary way of bankers' accounts; and, sup-

(1) 8 Ves. 46.
(2) 15 Ves. 432.
(3) 3 M. & S. 562.
(4) 4 D. M. & G. 372. 16 Jur. 91
(5) 4 D. M. & G. 383. 16 Jur. 274

posing this sum of £5000 were not trust money, it is clear that it was drawn out again and again. It was argued that the case of *Pennell* v. *Deffell* (1) does not decide that in such a case trust money is to be treated like an ordinary sum, and some observations of Lord Justice *Knight Bruce* were referred to as tending to prove that this case was like money placed by a trustee in a chest; but if we look at the words of the Lords Justices in that case, there can be no doubt as to the effect of the decision. There can be no question that at law, as between a banker and his customer, the debt is extinguished by the first payments made, and it would be an extraordinary thing if the debt could be in existence in equity when it is extinguished at law. Then what are the words of the Lords Justices in *Pennell* v. *Deffell?* [His Lordship then read passages from the judgments of Lord Justice *Knight Bruce* (2) and of Lord Justice *Turner* (3), and from the judgment of Vice-Chancellor *Wood* in *Frith* v. *Cartland* (4), and continued:—] If any case can be bound by authority I think this is. But, even without this authority, I should have no doubt in this case. If the injunction were left to stand I should be doing a great injustice. I am of opinion, therefore, that the motion ought to have been refused with costs, and must now be so refused; but there will be no costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Surr & Gribble*, agents for Messrs. *Whittington, Gribble, & Gouldsmith, Bristol.*

Solicitor for the Defendant: Mr. *W. Hitchcock.*

(1) 4 D. M. & G. 372. (3) 4 D. M. & G. 391, 393.
(2) Ibid. 383, 384. (4) 2 H. & M. 422.

L. J. G.
1869
July 9.

In re JOINT STOCK DISCOUNT COMPANY.

FYFE'S CASE.

Company—Contributory—Transfer of Shares—Registration—Laches of Contributory.

F., a registered holder of shares in a limited company, transferred them to *S.*, but the transfer was not registered, through the default of the company. An order was made to wind up the company in March, 1866, and in June *F.* appeared in person at Chambers on a summons to place him on the list of contributories, but no order was made on the summons. In June, 1867, *S.* died, and had no legal personal representative. In May, 1869, *F.* received notice from the official liquidator that his name was placed on the list of contributories. He then applied to have it removed:—

Held (reversing the order of the Master of the Rolls), that there was no laches on the part of *F.*, and that his name must be removed from the list of contributories:

Held, also, that the fact that the transferee had no legal personal representative, and that, consequently, there was no person who could be put on the list in *F.'s* place, was not material.

THIS was an appeal from an order of the Master of the Rolls in the winding-up of the *Joint Stock Discount Company, Limited*, placing the Appellant, Dr. *Andrew Fyfe*, on the list of contributories in respect of twenty shares.

The following admissions had been agreed on:—

1. That a transfer by Dr. *Fyfe* to *James Strawbridge* of twenty shares was executed by both parties prior to the commencement of the winding-up.

2. That such transfer was lodged at the office for registration on the 15th of February, 1866, but was never registered.

3. That *J. Strawbridge* died on the 28th of June, 1867, intestate, and that letters of administration of his personal estate had not been granted to any one.

The Petition for winding up was presented on the 7th of March, 1866, and an order for winding up made on the 17th of March.

On the 2nd of June, 1866, Dr. *Fyfe* attended an appointment before the Chief Clerk to shew cause why his name should not be placed on the list of contributories. According to the statement in Dr. *Fyfe's* affidavit he "successfully resisted" his name being

placed on the list; but all that appeared was that his name was not then put on the list. It was not, however, removed from the register of shareholders.

No steps were taken by Dr. *Fyfe* to have his own name removed or *Strawbridge's* substituted, and in May, 1869, he received a notice from the official liquidator that his name had been settled on the list. Under these circumstances the Master of the Rolls was of opinion that Dr. *Fyfe's* name ought to be retained on the list, and from this decision Dr. *Fyfe* appealed. In the course of the argument the 8th and 10th clauses of the articles of association were referred to.

By the 8th clause it was provided that the transferor of shares "shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register book in respect thereof;" and by the 10th, power was given to the company "to decline to register any transfer of shares in any case where the directors consider the transferee to be an irresponsible person, or that the transfer is made for purposes not conducive to the interests of the company."

Mr. *Jackson*, for the Appellant:—

The omission to register the name of the transferee was the fault of the company, for which the Appellant was not responsible, and he is entitled to be in the same situation as if the transfer had been duly registered before the winding-up: *Nation's Case* (1); *Hill's Case* (2) (both which cases were under the same winding-up as the present); *Shepherd's Case* (3).

(1) Law Rep. 3 Eq. 77.
(2) 1867. May 1st. M. R.

In re JOINT STOCK DISCOUNT COMPANY.

HILL'S CASE.

THIS was an application by *H. Hill* to have the name of *C. Branch* substituted for his name on the list of contributories of the *Joint Stock Discount Company, Limited*, in respect of forty shares. The facts were as follows:—

Hill sold the shares to *Branch* on the 15th of February, 1866, and the transfer, executed by both parties, was left for registration on the 24th of February, all calls on the shares having been previously paid. The practice of the company was for one of the directors on one day in every week to inspect and, if he approved, to pass all transfers left for registration during the last preceding week, and for the board at their next meeting to confirm the transfers so

(3) Law Rep. 2 Ch. 16.

L. J. G. 1869 FYFE'S CASE.

With respect to the delay on the part of the Appellant, he took no steps, because he considered that it was the duty of the official liquidator to rectify the register, after what had taken place on the 2nd of June, 1866. When a company is being wound up the parties are not affected by delay in the same way as they are in a working company, because no one is prejudiced by it: *Shewell's Case* (1). The reason why the official liquidator did not remove the Appellant's name was simply because, in the absence of a personal representative of *Strawbridge*, he had no one to place on the register in his place, but that did not justify the omission.

Mr. *Locock Webb* (Mr. *Jessel*, Q.C., with him), for the official liquidator:—

In *Shewell's Case* the company was formed in 1835, and there was no register; that case, therefore, is not similar to this. In the present case the articles of association provided that the transferor should be considered the holder of the shares until the name of the transferee should be substituted. And the directors had power to refuse to register a transfer if the transferee was irresponsible. The transferor cannot, therefore, claim to be removed from the register, unless he shews who is to be substituted for him: *Shipman's Case* (2). It was the duty of Dr. *Fyfe*, not of the official

---

passed. For several weeks before the 27th of February, 1866, the director had neglected to attend, and consequently there was a great accumulation of transfers in the office. On that day the director attended and passed as many transfers as he had time to inspect, taking them in alphabetical order, but left a great number, including the transfer of *Hill's* shares, uninspected. The directors held a meeting on the 1st of March, and also on the 3rd of March, on which latter day they resolved that no transfers should be registered without their express sanction. The company was shortly afterwards wound up, and *Hill's* transfer not having been registered, he was placed on the list of contributories.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the official liquidator.

Mr. *Southgate*, Q.C., and Mr. *Higgins*, for *Hill*.

The MASTER OF THE ROLLS held that as, but for the neglect of the director to attend in the previous weeks, the transfer might have been inspected and passed on the 27th of February, 1866, and confirmed on the 1st of March, and as no objection could have been made to the transfer, there had been unnecessary delay within the 35th section of the *Companies Act*, 1862, and that the transferee and not the transferor must be placed on the list of contributories.

(1) Law Rep. 2 Ch. 387.

(2) Ibid. 5 Eq. 219.

liquidator, to get the register rectified: *Sichell's Case* (1). The Appellant has, therefore, shewn no excuse for the delay.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that Dr. *Fyfe's* name ought not to be placed on the list of contributories. Reference has been made to the 8th and 10th of the articles of association, but these would equally have affected *Hill's Case* and *Nation's Case* (2). It is enough to say that the transfer was left for registration on the 15th of February, 1866, and ought to have been registered at the next meeting of the board, which was held on the 1st of March, if no objection was made. And as no objection was made, and bearing in mind that *Strawbridge* was already a shareholder in the company, I think that there was clearly delay and neglect on the part of the company in not registering the transfer on the 1st of March.

I have no doubt that, if an application had been made at once, the Master of the Rolls would have held that the Appellant's name ought to be removed, as he did in *Nation's Case;* but he was of opinion that Dr. *Fyfe* had been guilty of delay. I do not, however, think that there has been such delay on Dr. *Fyfe's* part as to preclude him from now applying; and therefore *Sichell's Case* is not applicable to the present. That case only decided that where the name of any person is on the register of shareholders, if that person is content that his name should remain on the register, the official liquidator is not to interfere to remove it; but it did not decide that if a person comes to the official liquidator without any delay, and shews him that his case is within a decided authority, like *Nation's Case,* the official liquidator is to wait till an order is made before he removes his name. The present case seems to be concluded by what was done by the official liquidator, who left the matter till May, 1869, when he served a notice on Dr. *Fyfe* that his name had been placed on the list of contributories. I must therefore take it that his name was not on the list till that time. I am of opinion that Dr. *Fyfe* is precisely in the same position as if the application had been made immediately after the making of the winding-up order. That being so, the

(1) Law Rep. 3 Ch. 119. (2) Law Rep. 3 Eq. 77.

L. J. G. 1869 FYFE'S CASE.

case will be governed by *Nation's Case* (1) and *Hill's Case*, and the principle laid down in *Shepherd's Case* (2). The only other point is the absence of any representative of *Strawbridge*. But I am of opinion that it is not necessary to put on another name; it is sufficient for the applicant to shew that his name has been improperly placed on the list. Dr. *Fyfe's* name must be removed from the list of contributories, and he must have his costs in the Court below; but there will be no costs of the appeal.

Solicitors for the Appellant: Messrs. *Walker & Sons.*

Solicitors for the Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

L. J. G. 1869 *July* 26.

In re CHINA STEAMSHIP AND LABUAN COAL COMPANY.

DRUMMOND'S CASE.

Company—Winding-up—Contributory—Subscriber of Memorandum—Paid-up Shares allotted to Subscriber for Purchase of Business.

It is not necessary that a subscriber of the memorandum of association of a company should pay for the shares for which he subscribes in money: it is sufficient that he gives money's worth.

The *C.* company was formed for the purpose of purchasing (among other things) the business of the *L.* company, which was intended to be wound up voluntarily, and it was agreed that the consideration should be paid partly in debentures, and partly in paid-up shares of the *C.* company, which were to be allotted to the shareholders of the *L.* company. *D.* was a shareholder and director of the *L.* company, and he also signed the memorandum of association of the *C.* company as a subscriber for twenty-five shares. No ordinary shares in the *C.* company were allotted to him, but he received 479 paid-up shares as one of the shareholders of the *L.* company. The shares allotted to the *L.* company were applied for by the liquidators of the *L.* company on behalf of the company, but were allotted to the shareholders individually. The *C.* company was afterwards wound up:—

Held (reversing the decision of the Master of the Rolls), that the contract by *D.* to take the twenty-five shares for which he subscribed was satisfied by the allotment of the 479 paid-up shares; and that he was not bound to take any ordinary shares.

THIS was an appeal by the Hon. *Francis Charles Drummond* from a decision of the Master of the Rolls made in the winding up

(1) Law Rep. 3 Eq. 77. (2) Law Rep. 2 Ch. 16.

of the *China Steamship and Labuan Coal Company, Limited,* hereinafter called the *China Steamship Company.*

The company was formed in 1865 for the purpose, as stated in the prospectus, of acquiring, consolidating, and developing the enterprises of two companies previously established, called the *China and Japan Steam Navigation Company* and the *Labuan Coal Company.* The nominal capital was £540,000 in 27,000 shares of £20 each.

It was stated in the prospectus that the allotment of the shares would be made on the following basis: namely, that 7500 shares, some fully paid up, and some with £10 paid up, would be reserved for allotment to the shareholders in the two existing companies, of which 6000 shares were stated to have been already applied for, and the deposits paid to the company's bankers, and that 1500 shares would be reserved for allotment in *Bombay.* This left 18,000 shares only for allotment in *England* to the public.

The purchase of the business of the two old companies was effected under two provisional agreements, dated the 2nd of February, 1863. The agreement between the *Labuan Coal Company* and the *China Steamship Company,* which alone is material to the present case, recited that the vendors were possessed of certain properties in the islands of *Labuan* and *Borneo,* consisting of leases or grants of coal mines, and plant, and coals, and other materials, with various rights and privileges, and witnessed that the purchasers should become entitled to all the said property, plant, materials, leases, rights, and privileges, from the 31st day of December, 1864, at the price of £108,750; the purchase-money to be paid as follows: namely, three-fourths thereof by the delivery to the vendors of £20 shares in the *China Steamship Company,* upon which the sum of £10, or the sum of £20, should be deemed to be paid up, or partly of one kind and partly of the other, at the option of the vendors, and the balance of the said purchase-money by the delivery to the vendors of debentures of the *China Steamship Company.*

This agreement was afterwards confirmed by the shareholders of the *Labuan Coal Company,* and that company was then wound up voluntarily.

All the 18,000 shares reserved for allotment in *England* were allotted before the end of February, 1865, and the company com-

L. J. G. 1869

DRUMMOND'S CASE.

menced business. At this time the shares were at a premium, but before the month of May, 1865, they were at a discount.

Of the 7500 shares reserved for the two old companies only 6594 were really taken up. They were allotted as follows:—To the *China and Japan Steam Navigation Company* 1142 fully paid-up shares, and 362 with £10 paid up—total 1504. To the *Labuan Coal Company* 2702 fully paid-up shares, and 2388 with £10 paid up—total 5090.

Mr. *Drummond* became one of the first directors of the *China Steamship Company*, and he signed the memorandum of association as a subscriber for twenty-five shares. He was also a shareholder of the *Labuan Coal Company*, and as such became entitled to an allotment of 478 fully paid-up shares, and one share with £10 paid up, in the *China Steamship Company*.

The shares to which the shareholders of the *Labuan Coal Company* were entitled under the above-mentioned agreement were applied for by the liquidators of the company, one of whom was Mr. *Drummond*, as trustees for the general body of shareholders, but it was part of the arrangement that the shares so applied for should be registered in the name, not of the trustees who applied for them, but of the individual shareholders who were beneficially entitled to them, and the 479 shares to which Mr. *Drummond* was entitled were accordingly registered in his name.

Mr. *Drummond* paid a deposit on the shares allotted to him, but the money was returned to him.

The articles of association of the *China Steamship Company* gave power to the directors to receive money paid in advance on the shares, and to issue fully paid-up shares.

The company was afterwards wound up voluntarily.

Under these circumstances the Master of the Rolls considered that the allotment of 479 shares, of which 478 were fully paid up, to Mr. *Drummond*, did not satisfy his obligation to take twenty-five shares as a subscriber of the memorandum of association, and ordered his name to be settled on the list of contributories in respect of twenty-five ordinary shares (1). From this order

(1) 1869. Jan. 18. The judgment of the Master of the Rolls was as follows:—

LORD ROMILLY, M.R.:—

I am quite satisfied that this case is exactly similar to *Migotti's Case* (Law

Mr. *Drummond* appealed. The matter came on before the Court of Appeal on the 18th of February, 1869; but it being stated that at the time when the question arose respecting Mr. *Drummond's* shares

Rep. 4 Eq. 238). This company was established to buy a certain property. One of the persons who signs the memorandum of association, although he may be entitled to take a part of the money derived from the sale when it is obtained by the vendor, yet is not himself the vendor. Now, according to what I held in *Migotti's Case*, none of the shares allotted to him in respect of that sale can be attributed to him as shares in respect of which he signed the memorandum of association; but, on the contrary, I must hold that he entered into an express undertaking with the other shareholders who joined the company to pay that money in cash. I do not at all mean to say that a person who signed the memorandum of association, and who had dealings with the company separately, might not pay for the shares for which he had signed the memorandum of association in money's worth. I do not mean to say it would be necessary for him to pay it in money; but he cannot pay it in property of which another person is the vendor. The *Labuan Coal Company* is the seller of its property, and that is to be bought, one-fourth in debentures and three-fourths in shares entirely or partially paid-up. Another person who happens also to be a shareholder in the *Labuan Coal Company* signs the memorandum of association. The shareholders in the *China Steamship Company* are entitled to believe that he pays that in hard cash or in money's worth to the company separate and distinct from the property which they are to buy from other people, and the mere fact that by his dealings with the *Labuan Coal Company* he is entitled to a portion of the shares which are given to that company does not in the slightest degree affect the right which all the shareholders have to say that he must fulfil the engagement he has entered into, and pay the money in hard cash or in money's worth due from him individually.

Now it is all the more important here, because it is to be observed that nothing at all was to be paid in cash by the *Labuan Coal Company*. Would no person who took shares in the *China Steamship Company* be influenced by the fact that there was probably no money in their hands of any description? The persons who signed the memorandum of association were supposed to supply the company with funds by paying for their shares, and it made a very important ingredient in the chance of success of the company that these persons, of whose connection with the *Labuan Company* the public may have had no knowledge, undertook to pay for the shares which they had taken. [His Lordship then referred to the facts in *Migotti's Case*, and continued:—] Now observe how similar the circumstances are here. Every one of the persons who signed the memorandum of association may have had paid-up shares given to him by the *Labuan Company;* and if the *Labuan Company* wished to start a company without a penny for the mere purpose of carrying on business, they had nothing to do but to get a number of apparently responsible persons, who happened to be shareholders of the *Labuan Company*, to sign the memorandum of association, and to then supply them with paid-up shares; and thereupon the whole company would be formed without a penny being supplied

L. J. G. 1869 DRUMMOND'S CASE.

all the shares in the company had been allotted, their Lordships ordered Mr. *Drummond's* name to be removed from the list on that ground, with leave to the liquidators to apply to have the case reheard if the statement should turn out to be incorrect.

The case now came on to be reheard, a statement being agreed on by both sides, from which it appeared that there were still shares which had never been allotted. It was there stated that the directors considered that they would not be justified in issuing to persons in *England* any of the shares reserved for *Bombay* and the members of the old companies in accordance with the prospectus, as that would have been a breach of faith towards those who subscribed upon the faith of the statements made in the prospectus, and would have depreciated the value of the shares reserved to be allotted in *England;* but that in October, 1865, the directors ascertained that the 1500 shares reserved for *Bombay* had not been allotted, and would not be required.

Mr. *Jessel,* Q.C. (Mr. *Speed* with him), for the Appellant:—

The subscription for twenty-five shares was fully satisfied by the allotment of the 479 paid-up shares to the Appellant. It is not necessary that a subscriber should pay his shares in money; it is sufficient if he pays money's worth. Here the Appellant and the other shareholders of the *Labuan Coal Company* sold their business to the *China Steamship Company,* and thus paid the value of the shares allotted to them. The Master of the Rolls relied upon *Migotti's Case* (1), but that case was different; for *Migotti* paid nothing to the company for his shares, but purchased them from another shareholder. In the present case, the company allotted the shares

---

by anybody, and without the public having the slightest means of knowing whether they had any funds for carrying on business.

The persons signing the memorandum were required by the Legislature to do so as an earnest that there were certain persons who were personally liable to pay money to the company as a guarantee of the good faith with which it was carried on, and it was not intended that this liability should be satisfied by having transferred to them paid-up shares of the vendor for the purchase of whose property the company was formed. I am therefore of opinion that Mr. *Drummond* is now properly put on the list for twenty-five shares, and I dismiss this summons with costs.

(1) Law Rep. 4 Eq. 238.

directly to the Appellant in consideration for his share of the business of the *Labuan Company*.

But supposing that this was a contract to take twenty-five of the shares not reserved for the two old companies, the directors put it out of their own power to perform it; for they allotted all the 18,000 unpaid shares at their disposal to the public, and there were, therefore, none available for the Appellant. It is true that afterwards the *Bombay* shares became available, but the question must be tried by the state of circumstances when the allotment ought to have been made, and when the shares were at a premium.

Mr. *Roxburgh*, Q.C., and Mr. *Wickens*, for the liquidator:—

The Act of Parliament (*Companies Act*, 1862, s. 14) is express that the subscriber is to "take" the shares for which he subscribes. The expression must mean that he is to pay for them. The only question here is, whether Mr. *Drummond* has complied with this enactment. We admit that it would have been sufficient if he had given money's worth for them, but it must be something which increases the assets of the company. Here the consideration for which the shares were allotted was the business of the old company, which did not increase the capital of the *China Steamship Company*, or the security of the creditors or the other shareholders. Moreover, the allotment of the 479 shares was not intended to be in satisfaction of the obligation to take twenty-five shares; it was a totally distinct transaction. The shares were allotted to the liquidators of the *Labuan Company* as representing that company, and Mr. *Drummond* received them in his capacity of a shareholder of the *Labuan Company*, not in respect of his subscription to the *China Steamship Company*. *Migotti's Case* (1) is directly in point. We also rely on *Evans's Case* (2); *Baron De Beville's Case* (3); *Elkington's Case* (4); *Pell's Case* (5).

SIR G. M. GIFFARD, L.J.:—

I will not trouble you, Mr. *Jessel*, for a reply. There are many facts before me now which were not before the Master of the Rolls,

(1) Law Rep. 4 Eq. 238.
(2) Ibid. 2 Ch. 427.
(3) Law Rep. 7 Eq. 11.
(4) Ibid. 2 Ch. 511.
(5) Law Rep. 8 Eq. 222.

L. J. G. 1869 DRUMMOND'S CASE.

and I cannot help thinking, if the Master of the Rolls had had these facts before him he would have come to a conclusion different from that at which he arrived.

With regard to the authorities applicable to this case, there are four. *Evans's Case* (1) is the first. That was a very simple case. The abstract of it is as follows: "*E.* signed the memorandum of association of a company as the holder of ten shares, and acted for a short time as a director of the company; other directors were then appointed, and *E.* never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up:—*Held*, that *E.'s* name ought to have been on the register, and that he was a contributory in respect of ten shares." That decision is simply that a man by signing a memorandum of association does contract to become a shareholder, and if he takes no shares, he will be held liable in respect of that contract if there are shares in existence which can be attributable to him. That is the extent of the decision in *Evans's Case*. The next is *Migotti's Case* (2), which, in my opinion, was most correctly decided. The abstract of it is this:—"The subscribers of the memorandum of association of a company under the *Companies Act*, 1862, are, by the 23rd section of the Act, bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, and this obligation is not satisfied by the allotment, at a subsequent period, of nominally fully paid-up shares." We shall see presently what that means. "Therefore where *M.* subscribed the memorandum of a company for five shares, and, eight months afterwards, five fully paid-up shares, which the company had agreed to allot to *C.* as part of the purchase-money for property sold to them by *C.*, were, by *C.'s* direction, allotted to *M.*, and the company was wound up:—*Held*, that *M.* was a contributory in respect of five shares, upon which nothing had been paid." I take that case to decide this, and to decide no more: that *Migotti*, by signing a memorandum of association, contracted, as between himself and the company, to take five shares, and that taking the five paid-up

(1) Law Rep. 2 Ch. 427. (2) Law Rep. 4 Eq. 238.

shares which did not belong to the company, but which did belong to *Carter*, was, in reality, taking the shares from *Carter*, and not from the company, and therefore that he had never fulfilled that contract with the company which he had entered into by signing the memorandum of association. Then we come to *Baron De Beville's Case* (1). I will only read one passage from the judgment, which appears to me to be perfectly accurate, and to be not inapplicable to the present case. In the course of his judgment the Master of the Rolls says (2): "A person cannot sign the memorandum of association for shares generally, and afterwards say that some, or all of them, are paid-up shares, unless money, or money's worth, was actually paid by him, or on his behalf, for those particular shares; and also, if he sign the memorandum of association in respect of shares there stated to be fully paid-up shares while they are not really paid up, he will, in my opinion, be liable to pay the amount due on the shares." That is to say, if a man contracts to take shares he must pay for them, to use a homely phrase, "in meal or in malt;" he must either pay in money or in money's worth. If he pays in one or the other, that will be a satisfaction. The fourth case which was cited was *Pell's Case* (3). In that case the decision seems to me to follow entirely the proposition laid down by the Master of the Rolls in *Baron De Beville's Case*. *Pell* signed the memorandum for 1350 shares; then it appears that by clause 86 of the articles of association an agreement was ratified, and declared to be binding on the company, by which *Pell* sold to the company the goodwill and stock-in-trade of certain businesses carried on by him, and it was agreed that, as part of the consideration to be paid to him, the company were to issue to *Pell* or his nominees 1500 shares of the nominal value of £20 each, which shares should be credited in the books of the company as fully paid up, in part payment of the purchase-money. What the Master of the Rolls held was this, that *Pell* "was liable to be put on the list for all the shares;" and to that he added, "but he was entitled to an inquiry as to what was the value of the property handed over by him to the company, and to be allowed such value, but no more, towards payment of his shares." Therefore, whatever may have been the

(1) Law Rep. 7 Eq. 11. (2) Law Rep. 7 Eq. 14.
(3) Law Rep. 8 Eq. 222. Since reversed, on the facts, on appeal, 3rd Nov. 1869. 4 W R 220.

L. J. G. 1869 DRUMMOND'S CASE.

grounds in fact for granting the inquiry, the principle on which the Master of the Rolls acted was again, as in *Baron De Beville's Case* (1), simply this, which I take to be the true proposition of law: —A man who signs the memorandum of association agrees to become a shareholder, and so long as there are shares that can be allotted to him he must fulfil that obligation.

Now, let us see what the facts of the present case are, and consider whether they are the same as in *Migotti's Case* (2). The *Labuan Coal Company* was in the course of being voluntarily wound up, and there was an arrangement between the *Labuan Coal Company* and the present company, that the present company should buy the property of the *Labuan Coal Company*, and that the present company was to pay in debentures or shares. But besides this agreement there was a prospectus, and upon the state of facts which is now before me, it is admitted that the shares were subscribed upon the footing of the prospectus, and the first thing that we find in the prospectus is this:—"The allotment of the shares will be made on the following basis: viz., 7500 shares, partly fully paid up and partly with £10 paid up, will be reserved for allotment to the applicants who are shareholders in the existing companies; of these 6000 have already been applied for and the deposits paid to the company's bankers." That pointed to an arrangement which was necessarily to be carried out directly between the shareholders in the *Labuan Company* and the present company, and the course of proceeding was this—there was first of all, as there must be in all these cases, a formal agreement between the *Labuan Company* and the present company. It is obvious that the *Labuan Company* could not take shares, and it is equally obvious that if shares were to be taken it was essential that there should be a direct action between the shareholders of the *Labuan Company* and this particular company. In this instance there was direct action, for the course that was pursued was this: certain persons, as trustees for the *Labuan Company*, sent in the applications for the shares, but there was no allotment except directly from the *China Steam Company* to the shareholder individually. Those shares could not be parted with without the assent of the shareholders, and the shareholder had the right of saying whether he

(1) Law Rep. 7 Eq. 11. (2) Law Rep. 4 Eq. 238.

L. J. G.
1869
DRUMMOND'S CASE.

would take £20 paid-up shares, or whether he would take £10 paid-up shares.

In that state of things I cannot see any distinction whatever between *Drummond's* position and the position of a person who, after having signed this memorandum of association, without saying anything more, had agreed to take 479 shares, and had paid up money in respect of those 479 shares. If a man comes to an agreement with a company to take 25 shares, and positively takes 479, saying nothing more, and pays up the money in respect of them, it would be impossible in that state of things to say that he had not satisfied the contract to take the 25 shares. The whole of that view of the case is entirely fortified by the statement of facts which has been agreed to. Amongst other things in that statement of facts, I find, first of all, that the directors state "that they considered that they would not be justified in issuing to persons in *England* any of the shares thus, in accordance with the prospectus, reserved for *Bombay* and for the members of the two old companies respectively, as that would have been a breach of faith towards those who had subscribed upon the faith of the statements made in the prospectus, and would have depreciated the value of the shares reserved to be allotted in *England*." That is quite consistent with the prospectus, because there was there a distinct stipulation that that number of shares should be reserved for persons in *Bombay*. Then the statement in the prospectus is, that 7500 shares, some fully paid up, and some with £10 paid up, were reserved for allotment to the shareholders in the two old companies, and that 1500 shares were reserved for allotment in *Bombay*. This left 18,000 shares only for allotment in *England*. It appears that all these 18,000 shares and 20 more were allotted on or about the 25th of February, 1865, and the company commenced business. At this time the shares were at a premium, but before the month of May, 1865, they were at a discount. Afterwards, that is to say, in October, 1865, and not before, it was ascertained that the shares reserved for allotment in *Bombay* and to the shareholders in the two old companies would not all be required by them; 6594 of such shares, however, were taken by them: so that literally, when Mr. *Drummond* really took these shares, he could not, consistently with the duties which he had

L. J. G. 1869 DRUMMOND'S CASE.

undertaken to perform, have got any other shares. For these reasons I am of opinion that the order made by the Master of the Rolls must be reversed, and Mr. *Drummond* must have the costs below, but there will be no costs of the appeal.

Solicitors for the Appellant: Messrs. *Meyrick, Gedge, & Loaden.*
Solicitors for the Liquidator: Messrs. *Mackenzie, Trinder, & Co.*

L. J. G. 1869 *July* 30.

In re OWEN.

Appointment of New Trustees—Person of Unsound Mind—Trustee Act, 1852, *s.* 10—*Lunacy—Jurisdiction.*

Where a Petition is presented under the Trustee Acts, 1850 and 1852, for the appointment of new trustees in the place of trustees some of whom are dead and the survivor a person of unsound mind, not so found by inquisition, the Petition may be presented in Lunacy only, and not in Chancery.
In re Boyce (1) considered.

10 Ch 274
36 Ch D. 112
19 Ch D 385

THIS was a Petition under the *Trustee Act,* 1850, and the *Trustee Act,* 1852, for the appointment of four new trustees of a will. There were originally four trustees, but three of them were dead, and the survivor was of unsound mind, though not so found by inquisition. The Petition was entitled in the two Acts and was presented in Lunacy only.

Mr. *W. N. Lawson,* for the Petitioner, stated that some doubt had been raised by the case of *In re Boyce* (1), whether in such a case, inasmuch as three of the trustees were to be appointed in the place of persons who were not of unsound mind, the Petition ought not to be presented in Chancery as well as in Lunacy.

He also referred to *Re Ormerod* (2).

SIR G. M. GIFFARD, L.J., said he was of opinion that the 10th section of the *Trustee Act,* 1852, was an express provision that the application may be made in Lunacy only. He thought there was no reason for the existence of any doubt. The order would be made as prayed, and drawn up in Lunacy alone.

Solicitors: Messrs. *Redpath & Holdsworth.*

(1) 12 W. R. 359. 4 De G & S (2) 3 De G. & J. 249.
205; 10 Jur N.S. 138.
Bolton Re Pearson 5 Ch D. 982

In re RENSHAW'S TRUSTS.

L. J. G.
1869
July 31.

Appointment of New Trustee—Trustee Act, 1850—*Bankruptcy Act*, 1849.

A new trustee appointed in the place of a trustee who had become bankrupt had never surrendered, and had not been heard of for several years.

THIS was a Petition under the *Trustee Act*, 1850, and the Bankruptcy Act, 1849, by the *cestuis que trust* under the will of *B. Renshaw*, for the appointment of a new trustee. The trustee whose place it was sought to fill up had been adjudicated bankrupt about three years before the Petition, had never surrendered, had absconded about the time of the adjudication, and had never since been heard of by his family.

Mr. *Charles Browne* stated that he mentioned the case to the Court by the desire of Vice-Chancellor *James*, who felt a difficulty on the ground of the decision in *Turner* v. *Maule* (1). He referred to the *Trustee Act*, 1850, ss. 10, 32, 34, and the Bankruptcy Act, 1849, s. 130.

The LORD JUSTICE GIFFARD stated his opinion to be, that as the circumstances of the case, independently of the bankruptcy, would have justified the appointment of a new trustee, the order might be made.

The reporter is informed that Vice-Chancellor *James* accordingly made the order.

Solicitor: Mr. *W. Lovell.*

(1) 15 Jur. 761.

L. J. G.
1869
July 26.

In re HORSLEY AND KNIGHTON'S PATENT.

Jurisdiction—Patent Law Amendment Act, 1852, *s.* 38—*Right of Appeal from the Master of the Rolls.*

There is no right of appeal to the Court of Appeal in Chancery against an order made by the Master of the Rolls under the 38th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), to expunge an entry in the register of proprietors of patents.

THIS was an appeal from an order made by the Master of the Rolls under the 38th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), to expunge an entry made in the register of proprietors of patents established by the 35th section of the same Act (1). The case is reported (2).

On the appeal being opened the counsel for the Respondent took the preliminary objection that there was no right of appeal from such an order.

Sir *R. Baggallay*, Q.C., and Mr. *Cracknall*, for the Appellant:—

There are no words in the *Patent Law Amendment Act* which exclude an appeal from an order of the Master of the Rolls. The case, therefore, differs from that of *Sir Samuel Romilly's Act* (52 Geo. 3, c. 101), in which the power to make orders was given to the Lord Chancellor, or Lords Commissioners of the Great Seal,

(1) The 38th section is as follows:—"If any person shall deem himself aggrieved by any entry made under colour of this Act in the said register of proprietors, it shall be lawful for such person to apply by motion to the Master of the Rolls, or to any of the Courts of Common Law at *Westminster* in term time, or by summons to a Judge of any of the said Courts in vacation, for an order that such entry may be expunged, vacated, or varied, and upon any such application the Master of the Rolls, or such Court or Judge respectively, may make such order for expunging, vacating, or varying such entry, and as to the costs of such application, as to the said Master of the Rolls, or to such Court or Judge, may seem fit, and the officer having the care and custody of such register, on the production to him of any such order for expunging, vacating, or varying any such entry, shall expunge, vacate, or vary the same according to the requisitions of such order."

(2) Law Rep. 8 Eq. 475.

or Master of the Rolls, or Court of Exchequer, with an express proviso that every order so made should be final and conclusive unless the party aggrieved appealed within two years to the House of Lords: *In re Royston Grammar School* (1). In the *Infants Custody Act* (2 & 3 Vict. c. 54, s. 1), the jurisdiction is given to the Lord Chancellor and the Master of the Rolls, and yet it is exercised by the Vice-Chancellors, and an appeal is allowed to the Lord Chancellor: *Warde* v. *Warde* (2); *In re Taylor* (3). In the *Solicitors Act* (6 & 7 Vict. c. 73, s. 39) similar words are used, and an appeal has always been allowed under that Act.

[They also referred to the *Municipal Corporations Act* (5 & 6 Will. 4, c. 76); *Bignold* v. *Springfield* (4); *Challet* v. *Hoffman* (5).

Mr. *Jessel*, Q.C., Mr. *Rodwell*, and Mr. *T. Aston*, for the Respondent:—

The jurisdiction under the *Patent Law Amendment Act* is specially given to the Master of the Rolls, not as one of the Judges of the Court of Chancery, but as the keeper of the records. As no appeal is given by the Act, none exists. By the *County Court Equitable Jurisdiction Act* (28 & 29 Vict. c. 99, s. 18), an appeal is specially given to one of the Vice-Chancellors, but his decision cannot be reviewed by the Lord Chancellor.

SIR G. M. GIFFARD, L.J.:—

I think the case is too clear for argument. Probably a right of appeal would have been given if the attention of the Legislature had been called to the subject. An entirely new register of proprietors of patents was created by the Act, and then the 38th section creates a new jurisdiction, and gives the power of expunging entries to the Master of the Rolls, or to one of the Common Law Judges; but nothing is said about an appeal from their decisions, and without such an enactment I think there can be no appeal. In coming to this conclusion I do not forget that in *Sir S. Romilly's*

(1) 9 L. J. (Ch.) 250.
(2) 2 Ph. 786.
(3) 11 Sim. 178.
(4) 7 Cl. & F. 71.
(5) 7 E. & B. 686.

L. J. G. 1869 *In re* Horsley and Knighton's Patent.

Act there are negative words which do not exist here; but this is an entirely new jurisdiction created by the statute. I must, therefore, refuse to hear the appeal.

Solicitors: Mr. *F. C. Greenfield;* Mr. *F. T. Dubois,* agent for Mr. *Samuel Leech, Derby.*

END OF VOL. IV.

INDEX.

ACCELERATION OF REMAINDER - 296
See FORFEITURE CLAUSE.

ACCEPTANCE — Bill of exchange — Company — Authority of directors - - 460
See NEGOTIABLE SECURITIES.

ACCEPTANCE OF SHARES—*Company—Qualified Acceptance — Condition that Shareholder should have Building Contract — Attending Meetings — Waiver.*] *S.*, a builder, wrote a letter to the directors of a hotel company, stating that in consideration of the contract for making the alterations at the hotel being secured to him, he agreed to subscribe for 300 shares, and pay the deposit, as soon as he was satisfied that 1500 shares, including his, had been subscribed for, and that the directors had passed a resolution that he should have the contract for the alterations. The calls on the shares were to be set off against the amount due on the contract. The directors accepted the application on the terms of his letter, and passed a resolution to the effect required. They then sent an unconditional notice of allotment of 300 shares to *S.*, and entered his name for that amount on the register. *S.* did not return the notice of allotment; but having ascertained that the resolution had been passed and 1500 shares taken up, sent in a formal application and paid the deposit. No further allotment was made to *S.*: the certificates were not delivered to him, nor was he called upon to pay any calls. He afterwards attended two meetings of shareholders for the purpose of seeing that the contract was secured to him. No contract for alterations was ever prepared, and shortly afterwards the company was wound up voluntarily:—*Held* (affirming the decision of the Master of the Rolls), First: that the contract to take the shares was conditional on *S.* having the contract to make the alterations:—Secondly: that the condition was not performed by the mere passing of the resolution that *S.* should have the contract: —Thirdly: that *S.* had not waived the condition by not returning the notice of allotment, or by attending the meetings of shareholders.—*S.* was, therefore, held not to be a contributory of the company. *In re* ALDBOROUGH HOTEL COMPANY. SIMPSON'S CASE - - - - - 184

2. —— *Notice of Allotment not sent—Acceptance by executing Transfer—Fully paid-up Shares —Costs of Official Liquidator.*] *C.* applied, in May, 1865, for shares in company *A.*, at the instigation of *J. P.*, the brother of the managing director of company *B.*, who assured him that he would be indemnified by company *B.* from all liability. *C.* handed the application to *J. P.*, who sent it in and paid the deposit. The shares were allotted to *C.*, and his name was placed on the register, but the notice of allotment was not sent to him, but to the office of company *B.* The allotment money, which, with the deposit, amounted to £3 per share, was paid by company *B.* In July, 1866, *C.* executed a blank transfer of the shares which had been allotted to him, at the request of *J. P.*, in order to enable company *B.* to deal with them. In the transfer the shares were described as fully paid up, but in reality no more than the allotment money had been paid. Company *A.* was afterwards wound up:—*Held* (affirming the decision of *Malins*, V.C.), that although *C.* might have repudiated the shares in July, 1866, on the ground of his having received no notice of the allotment, yet by executing the transfer he had accepted the shares, and he was placed on the list of contributories for the number of shares allotted to him, with £3 only paid up.—*R.* applied for shares in company *A.* at the instigation of the managing director of company *B.*, who gave him a letter on behalf of company *B.*, indemnifying him against all responsibility. *R.* sent in the application himself from his own address, and paid the deposit by a cheque on his own banker, although the money was supplied by company *B.* The shares were allotted to *R.*, and his name was placed on the register; no notice of allotment was sent to him, but the notice was sent to the office of the company *B.* Company *A.* was afterwards wound up:—*Held* (reversing the decision of *Malins*, V.C.), that there was no contract to take the shares, and *R.'s* name was removed from the list of contributories.—Where, on an appeal, the official liquidator supports unsuccessfully the decision of the Court below, his costs of the appeal will be allowed out of the estate—where he appeals and is unsuccessful it will be left to the Court below to determine whether they shall come out of the estate. *In re* PERUVIAN RAILWAYS COMPANY. CRAWLEY'S CASE. ROBINSON'S CASE - - - - - - 322

3. —— *Notice of Allotment.*] *W.* applied for shares in company *A.* at the instigation of *J. P.*, the brother of *E. P.*, the managing director of company *B.* The shares were allotted to *W.*, but no notice was sent to him or to *J. P.*, but the let-

ACCEPTANCE OF SHARES—*continued.*

ter of allotment was sent to the office of company *B.*:—*Held*, that *W.* was not a contributory to company *A. In re* Peruvian Railways Company. Wallis's Case - - 325, n.

ACCOUNT—Patentee against machine maker—Agent - - - - 292
See Account of Patent.

ACCOUNT OF PATENT—*Agent—Equity.*] A patentee agreed with a machine maker, that the machine maker should make machines according to the patent and sell them, taking a certain sum upon each machine for himself, and paying to the patentee as a royalty the amount charged for the machines above that sum:—*Held*, that the patentee could not maintain a suit in equity for an account against the machine maker as agent.—In one case the machine maker received a sum of money for the patentee:—*Held*, that this was not sufficient to support the suit, and that the patentee's remedy was at law.—Decree of *Giffard*, V.C., affirmed. Moxon *v.* Bright - - 292

ACCOUNTS—Mortgagee and mortgagor—Costs
See Just Allowances. [304

—— Partnership—Exceptions to answer - 336
See Partnership Accounts.

—— Solicitor—Duty to keep - - 43
See Solicitor's Accounts.

ACKNOWLEDGMENT BY MARRIED WOMAN—Effect of delay in - - - 35
See Fraud of Married Woman. 1.

ACT OF BANKRUPTCY — Unstamped and unregistered creditors' deed - - 47
See Unstamped Creditors' Deed.

ADMINISTRATION—Costs of suit which is stayed
See Costs of Suit which is stayed. [412

AFFIDAVIT—Amount of debts—Bankruptcy—Jurisdiction of County Court - 648
See County Court Jurisdiction.

—— Interpleader suit—No collusion - 347
See Affidavit of no Collusion.

AFFIDAVIT OF NO COLLUSION—*Interpleader Suit—Practice—Payment into Court—Undertaking as to Damages.*] The Plaintiff's affidavit of no collusion in an interpleader suit cannot be rebutted before the hearing by a counter affidavit; and the Plaintiff is entitled, notwithstanding such counter affidavit, to an order for payment of the money into Court, and for an injunction.—The Plaintiff's right to this protection is not lost by his filing additional affidavits to verify the statements in the bill; but in a case where a charge of collusion was made the Court put the Plaintiff under an undertaking as to damages.—The order of *Malins*, V.C., reversed. Manby *v.* Robinson [347

AGENT—Mortgage—Payment to person not authorized - - - - 288
See Payment of Mortgage Debt.

—— Parol appointment of - - - 548
See Agent appointed by Parol.

—— Patentee and machine maker - - 292
See Account of Patent.

AGENT APPOINTED BY PAROL—*Specific Performance — Vendor and Purchaser — Statute of Frauds, s.* 8—*Contract—Demurrer—Pleading—*

AGENT APPOINTED BY PAROL—*continued.*

Sufficiency of Allegation of Contract.] A contract for the purchase of land made by an agent will be enforced, although the agent be appointed merely by parol.—In a bill filed by a purchaser for specific performance of a contract for sale, it was alleged that the contract was made by one of the Defendants as agent for the Plaintiff, but that the agent claimed the benefit of the contract for himself. It appeared by the statements in the bill, that the agent was appointed merely by parol.—Demurrers by the two Defendants, the agent and the vendor, were overruled.—The decision of *Malins*, V.C., affirmed.—*Bartlett* v. *Pickersgill* (4 East, 577, n.) commented on.—An allegation in a bill by a purchaser for specific performance that he was informed by his agent that a written agreement was executed, followed by statements referring to the agreement as actually made:—*Held*, on demurrer, a sufficient allegation of the execution of a written contract. Heard *v.* Pilley - - - - - - 548

ALIENATION—Forfeiture by marriage - 296
See Forfeiture Clause.

ALLOTMENT OF SHARES—*Company—Contributory—Conditional Allotment—Repudiation—P.* applied for ten shares in a company, the prospectus of which stated that £1 was to be paid on each share on application and £2 more on allotment. The directors accepted the application on the 1st of August, and on the 4th they wrote to *P.*, stating that they allotted the shares on payment of the balance of the allotment money on or before the 11th instant. Before that day had arrived *P.* discovered that there were misrepresentations in the prospectus, and wrote to the directors repudiating the shares and claiming a return of the deposit. *P.'s* name was entered on the register as on the 1st of August, but it was doubtful at what time the entry was really made. The company was soon afterwards wound up:—*Held* (affirming the decision of *Malins*, V.C.), that the contract to take the shares was *in fieri* until the 11th of August, and that *P.* had a right to repudiate them up to that date. His name, therefore, was removed from the list of contributories. *In re* Warren's Blacking Company. Pentelow's Case - - - - - 178

2. —— *Contributory — Conditional Allotment —Time allowed for Payment—Introduction of new Term.*] *P.* applied for shares according to a form of application which bound him to pay, in addition to the £1 per share which he had paid on application, £4 per share "on allotment." On the 6th of September he received a letter stating that the Directors had allotted him eighty shares, "on which £5 per share must be paid on or before the 15th instant." On the 10th of September, before anything further had been done, *P.* wrote to the company refusing to accept the shares:—*Held* (affirming the decision of *Malins*, V.C.), that the application and the letter constituted a complete contract, and that the repudiation of the 10th of September was ineffectual. *Pentelow's Case* (Law Rep. 4 Ch. 178) distinguished. *In re* Aberaman Ironworks. Peek's Case - - - - - 532

—— Notice of - - - - 322, 325, n.
See Acceptance of Shares. 2, 3.

AMALGAMATION OF COMPANIES—*Ultrà Vires—Liabilities—Dissentient Shareholder—Suit on behalf of others—Delay.*] A company agreed to amalgamate with or purchase the good-will and property of another company in consideration of 25,000 shares in the purchasing company to be allotted amongst the shareholders of the selling company; the assets of the selling company were to be applied in payment of its liabilities, and then in payment of £6 a share on each of the 25,000 shares; and if the assets were insufficient, a call was to be made on the shareholders in the selling company:—*Held*, that such an arrangement, by which liabilities were imposed on the shareholders, was void as *ultrà vires*, and could not be supported under s. 161 of the *Companies Act*, 1862:—*Semble*, that such an arrangement would be void, even if only the shareholders who assented to it were to be bound by it. Such an arrangement will be set aside in a suit by a dissentient shareholder of the selling company on behalf of himself and all the other shareholders, although a large number of the shareholders had assented to it, and the arrangement had actually been carried into effect. The arrangement was made at the end of May; a dissentient shareholder signified his dissent early in June, and continued to do so until November, when he filed a bill to have the arrangement set aside:—*Held*, that his suit was not barred by his delay. Decree of *Wood*, V.C., affirmed with a variation. CLINCH *v.* FINANCIAL CORPORATION 117

2. —— *Contributory—Void Amalgamation—Repudiation of Shares—Suit to set aside Amalgamation.*] An agreement was entered into between company *A.* and company *C.* for amalgamation, on the terms that company *A.* should purchase the assets of company *C.*, and give the shareholders of company *C.* equivalent shares in company *A.*, and that company *C.* should be wound up voluntarily. On the footing of this amalgamation, *H.*, who was a shareholder in company *C.*, applied for shares in company *A.*, which were allotted to him, and his name was placed on the register accordingly. Shortly afterwards, *H.*, and several other shareholders repudiated their shares in company *A.*, on the ground that company *C.* had no power to amalgamate with another company, and that there had been misrepresentations in the circular. The repudiating shareholders acted by the same solicitor, and one of them, *F.*, shortly afterwards filed a bill to set aside that amalgamation, and presented a Petition to wind up company *C.* A compromise was subsequently made of the suit on the terms that the amalgamation should be rescinded and the names of the repudiating shareholders should be removed from the register of company *A.* This was agreed to by both companies and sanctioned by the Judge, but the name of *H.* still remained on the register of company *A.*, and that company was also soon afterwards wound up. The agreement for compromise was signed by the solicitor acting for the repudiating shareholders, who was also the solicitor in *F.'s* suit, but there was no proof that *H.* had ever authorized him to agree to the compromise on his behalf, or to do any act in the matter, except to write a letter repudiating the shares.—*Held* (affirming the decision of *Stuart*, V.C.), that *H.* was liable as a contributory of company *A.*

AMALGAMATION OF COMPANIES—*continued.*

In re LONDON AND COUNTY GENERAL AGENCY ASSOCIATION. HARE'S CASE - - - 503

3. —— *Contributory—Void Amalgamation—Director.*] By the articles of association of a company the directors were to be elected by the shareholders, and power was given to purchase the business of any other company. Power was also given by any extraordinary meeting of the company to amalgamate with any other company. An agreement was made for the amalgamation of this company with another company on the terms that the second-named company should sell their assets to the first-named company; that the directors of the amalgamated board should consist of the present five directors of the purchasing company, and of seven of the directors of the selling company. This agreement was acted upon, but was never confirmed by an extraordinary meeting of the purchasing company:—*Held* (affirming the decision of *James*, V.C.), that this agreement was void, and that two of the directors of the selling company, who had been allotted shares in the purchasing company in exchange for shares in the selling company and had acted as directors of the amalgamated company, were not liable to be put on the list of contributories to the purchasing company. *In re* LONDON AND NORTHERN INSURANCE CORPORATION. STACE AND WORTH'S CASE 682

APPEAL—Administration suit—Creditor who has not appealed - - - 737
See MERCANTILE LAW AMENDMENT ACT.

—— Certificate of one counsel - - 561
See CERTIFICATE OF ONE COUNSEL.

—— Costs, appeal for—Costs of trustees 697
See APPEAL FOR COSTS. 2.

—— Costs, appeal for—Motion to commit 264
See APPEAL FOR COSTS. 1.

—— Costs—Representative case - - 748
See LLOYD'S BONDS.

—— Order in Chambers - - - 616
See TAXATION OF COSTS. 2.

—— Patent Law Amendment Act—Order of Master of the Rolls - - 784
See REGISTER OF PROPRIETORS OF PATENTS.

APPEAL FOR COSTS—*Motion to commit.*] A motion to commit a Defendant for breach of an injunction having been refused without costs, the Defendant appealed:—*Held*, that there is no rule that a motion to commit, if refused, must be refused with costs; and that an appeal as to costs in such a case will not be entertained. HOPE *v.* CARNEGIE - - - - - 264

2. —— *Practice—Costs of Trustees.*] An order that trustees shall pay the costs of a suit personally forms no exception to the general rule that no appeal will be allowed for costs. TAYLOR *v.* DOWLEN - - - - - 697

APPOINTMENT—Execution of, by gift of legacies - - - - - 587
See APPOINTMENT BY GIFT OF LEGACIES.

APPOINTMENT BY GIFT OF LEGACIES—*Will—General Power—Legacies—1 Vict. c. 26, s. 27.*] Where a testatrix has a general power of appointment over sums of money, a bequest by her of pecuniary legacies *held* to operate as an execution of the power under 1 Vict. c. 26, s. 27.

APPOINTMENT BY GIFT OF LEGACIES—*contd.*
Order of *Stuart*, V.C., affirmed. *In re* Wilkinson - - - - - - 587

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN — *Lease pur autre Vie* — 11 *Geo.* 2, *c.* 19, *s.* 15—4 *& 5 Will.* 4, *c.* 22.] An equitable tenant for life under a settlement of freehold leases for lives, obtained a renewed grant for lives to himself. At his death the property was in the occupation of yearly tenants, under parol demises by him:—*Held* (reversing the decision of *Stuart*, V.C.), that the rents were not apportionable either under statute 11 Geo. 2, c. 19, or 4 & 5 Will. 4, c. 22. Mills *v.* Trumper 320

APPROPRIATION OF PAYMENTS — Bankers' account - - - - 764
See Bankers' Account.

ARBITRATION—Enlargement of time for award —Lands Clauses Act - - 554
See Enlargement of Time for Award.

ASSENT OF CREDITORS—*Bankruptcy Act*, 1861, *s.* 192—*Companies Act*, 1862, *s.* 75—*Deed of Arrangement by Contributory — Amount of Debt — Future Calls* — A contributory of a company in course of winding up executed a deed of arrangement with his creditors, and entered the company as creditors only for a call of £5 per share which had been made. He was liable to be called on for £35 per share more, and calls to that amount were afterwards made. If the company had been entered as creditors for this whole amount, the dissenting creditors would have been the majority in value. The debtor subsequently alleged a set-off against the calls, which he had not stated on the application for registration:—*Held*, that the company ought to have been entered as creditors for the estimated amount of the future calls, as well as the call already made, being the amount proveable in bankruptcy according to the *Companies Act*, 1862, s. 75; that the deed, therefore, was not assented to by the majority required by the *Bankruptcy Act*, 1861, s. 192; and was not binding on a dissentient creditor. *Ex parte* Pickering. *In re* Pickering - - - - - 58

2. —— *Bankruptcy Act*, 1861, *s.* 192 — *Bona fides.*] An officer in the army, who was under an engagement with a judgment creditor to pay the debt out of the moneys to arise from the sale or exchange of his commission, retired on half-pay, and, on being arrested by the judgment creditor, executed an arrangement deed, assented to by the requisite majority of his creditors, by which he bound himself to pay them a composition of 10*s.* in the pound. At this time he had money in hand a little more than sufficient to pay the composition on his debts, which debts amounted to about £3000, and his half-pay was, at least, £150 a year. No meeting of creditors was held, nor was it shewn that the assenting creditors had investigated the debtor's affairs:—*Held*, that it was to be inferred that the assenting creditors had not exercised a discretion, with a view to their own pecuniary interests, as to whether the composition was fair, but had acted from some motive leading them to favour the debtor, and that the deed was invalid as against a dissenting creditor. *Ex parte* Deacon. *In re* Deacon - - - 87

ASSIGNEES IN BANKRUPTCY—Contract completed by assignee—Allowance of payments - - - - 242
See Contract completed by Assignee.

—— Official assignee — Title before appointment - - - - 247
See Equity to Settlement.

—— Omission to choose at first meeting - 68
See Choice of Assignees.

ASSIGNMENT—Preference of some creditors 622
See Fraudulent Conveyance.

ATTORNEY-GENERAL — Public convenience — Level crossing - - - 194
See Level Crossing.

BANKERS—Guarantee for overdrawn account—Creditors' deed - - - 398
See Creditor holding Security. 3.

BANKERS' ACCOUNT—*Following Trust Fund—Appropriation of Payments—Solicitor.*] A solicitor being entrusted with £5000 belonging to the Plaintiff, his client, for the purpose of investing it on mortgage, paid it to his general account at his bankers, and never applied it to the purpose intended. Before his death, which happened about eighteen months afterwards, the solicitor drew out various sums exceeding the sum of £5000, together with the balance previously standing to his credit, and also paid in considerable sums, so that the balance at the time of his death standing to his credit was £2700. The Plaintiff filed a bill against his administrator claiming the balance at the bankers as trust money, and moved for an injunction to restrain the administrator and the bankers from dealing with the fund:—*Held* (reversing the decision of *James*, V.C), that the sums drawn out by the solicitor must be appropriated to the sums paid to his credit in the order in which they had been paid in, and the injunction was refused.—*Pennell* v. *Deffell* (4 D. M. & G. 372) considered. Brown *v.* Adams - - - - - 764

BANKERS' BOOKS—Production in winding-up
See Production of Documents. [421

BANKRUPT — Shareholder — Discharge before winding-up - - - - 274
See Bankrupt Shareholder.

BANKRUPT SHAREHOLDER — *Company—Contributory—Discharge before Winding-up—Liability for future Calls — Bankruptcy Act*, 1861, *s.* 154—*Companies Act*, 1862, *ss.* 75, 77.] A shareholder in a company became bankrupt, and obtained his discharge. Afterwards the company was wound up voluntarily. The assignees repudiated the shares and they remained in the name of the bankrupt. At the time of the bankruptcy no calls were due, and no future calls were proved in the bankruptcy, nor was there anything to shew that they were capable of valuation at the date of the bankruptcy:—*Held* (affirming the decree of the Master of the Rolls), that the bankrupt remained liable to the future calls and must be put on the list of contributories.—*Martin's Patent Anchor Company* v. *Morton* (Law Rep. 3 Q. B. 306) commented on. *In re* General Estates Company. Hastie's Case - - - 274

BANKRUPT TRUSTEE — *Appointment of New Trustee — Trustee Act*, 1850 — *Bankruptcy Act*, 1849.] A new trustee appointed in the place of a trustee who had become bankrupt, had never surrendered, and had not been heard of for several years. *In re* RENSHAW'S TRUSTS - - 783

BANKRUPTCY — Act of — Unstamped and unregistered creditors' deed - - 47
See UNSTAMPED CREDITORS' DEED.

—— Appeal from Registrar - - - 352
See BANKRUPTCY APPEAL.

—— Choice of assignees—Omission to choose at first meeting - - - 68
See CHOICE OF ASSIGNEES.

—— First meeting of creditors — Omission to choose assignees - - - 68
See CHOICE OF ASSIGNEES.

—— Jurisdiction — Administration of trusts of creditors' deed - - - 356
See TRUSTS OF CREDITORS' DEED.

—— Leave to issue execution - - 690
See EXECUTION,—LEAVE TO ISSUE.

—— Marshalling securities—Pledge of bills of lading by consignees - - 168
See MARSHALLING. 1.

—— Proof—Breach of trust - - - 280
See IMPROPER INVESTMENT.

—— Proof—Execution against property of partners members of another firm - 125
See CREDITOR HOLDING SECURITY. 2.

—— Proof—Future calls - - - 58
See ASSENT OF CREDITORS. 1.

—— Proof—Holder of forfeited shares - 639
See FORFEITURE OF SHARES.

—— Proof of debt by declaration—Appeal—Debt not formally proved - - 68
See CHOICE OF ASSIGNEES.

—— Proof — Security on property of bankrupt and a third person - - - 49
See CREDITOR HOLDING SECURITY. 1.

—— Secured creditor—Guarantee—Dividend for full amount - - - - 398
See CREDITOR HOLDING SECURITY. 3.

BANKRUPTCY APPEAL—*Appeal from an Order of the Registrar—Practice.*] No appeal can be brought to the Court of Appeal in Bankruptcy from an order of a Registrar unless the Registrar made the order when sitting as deputy for the Commissioner. All other orders of the Registrar must be reviewed by the Commissioner, or, if the matter has been transferred into the County Court, by the Judge of the County Court.—*Ex parte Moss* (Law Rep. 3 Ch. 29), and *Ex parte Barnett* (Law Rep. 4 Ch. 68), observed upon. *Ex parte* BARNETT. *In re* TAYLOR. (2.) - 352

—— Creditor whose debt has not been formally proved - - - - - 68
See CHOICE OF ASSIGNEES.

BENEFIT BUILDING SOCIETY - - 207
See BUILDING SOCIETY.

BILL OF LADING—Pledge by consignee of cargo
See MARSHALLING. 1. [168

BILLS OF EXCHANGE—Securities for - 423
See SECURITIES FOR BILLS OF EXCHANGE.

BONA FIDES—Assent to creditors' deed - 87
See ASSENT OF CREDITORS. 2.

BORROWING POWERS — Loan on deposit of shares - - - - 252
See TRANSFER OF SHARES. 2.

BREACH OF TRUST—Covenant—Specialty debt
See SPECIALTY DEBT. [449

—— Improper investment—Proof in bankruptcy
See IMPROPER INVESTMENT. [280

BREAKING UP STREETS TO LAY GAS-PIPES—*Nuisance—Injunction—Amendment at Hearing.*] The disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down gas-pipes, is not a nuisance so serious and important that a Court of Equity will interfere by injunction to prevent it.—*Attorney-General* v. *Sheffield Gas Consumers Company* (3 D. M. & G. 304) followed.—The decision of *Malins*, V.C., reversed.—The views of the governing body of a town, and the motives of the persons instituting a suit, are not immaterial where the complaint is of a public injury.—An information and bill was filed against a gas company, stating, as the fact was, that they had been formed for the purpose of lighting the streets and private houses of a town, and that they had made a contract with the Commissioners of the town to light the streets, and praying for an injunction to restrain them from breaking up the pavements. After the suit was at issue, but before the hearing, the contract was rescinded, but the Defendants still claimed to go on laying their pipes for the purpose of supplying private houses:—*Held*, that it was consistent with the practice of the Court to give leave at the hearing to introduce by amendment a statement of the rescinding of the contract. ATTORNEY-GENERAL *v.* CAMBRIDGE CONSUMERS GAS COMPANY - 71

BUILDING CONTRACT—Completion by assignee in bankruptcy - - - 242
See CONTRACT COMPLETED BY ASSIGNEE.

BUILDING SOCIETY—*Permanent Benefit Building Society—Mortgage—Power of Sale—Discount on future Instalments.*] A member of a benefit building society obtained an advance on his shares on executing a mortgage in the form prescribed by the rules, by which he covenanted to repay the advance with interest by monthly subscriptions calculated to extend over a certain number of months. The mortgage contained a power of sale in the event of the subscriptions falling into arrear for three months, and the purchase-money was to be applied in satisfaction of all moneys then due or thereafter to become due from the mortgagor in respect of subscriptions, fines, insurance, or otherwise, under the mortgage deed, and the surplus to be paid to the mortgagor. The mortgagor paid a few of the subscriptions, and then fell into arrear, and the mortgaged premises were sold by the directors:—*Held* (reversing the decision of *Giffard*, V.C.), that the mortgagor was not entitled to any rebate or discount upon the amount of subscriptions not due at the time of the sale, although the rules prescribed that such an allowance should be made in case of a mortgagor redeeming his mortgage before the expiration of the full period of payment.—In such a case there is no difference between a permanent society and one intended to be wound up after a definite period. MATTERSON *v.* ELDERFIELD - 207

BY-LAW OF COMPANY—Notice - - 252
See Transfer of Shares. 2.

CALLS—Provable in bankruptcy—Future calls
See Assent of Creditors. 1. [58

CASES — *Attorney-General* v. *Sheffield Gas Consumers Company* (3 D. M. & G. 304) followed - - - - - 71
See Breaking up Streets to lay Gas Pipes.

—— *Barnett, Ex parte* (Law Rep. 4 Ch. 68) observed upon - - - - 352
See Bankruptcy Appeal.

—— *Bartlett* v. *Pickersgill* (4 East, 577, n.) commented on - - - - 548
See Agent appointed by Parol.

—— *Boyce, In re* (12 W. R. 359) considered 782
See Person of Unsound Mind. 2.

—— *Child* v. *Douglas* (Kay, 560) considered 218
See Covenant running with the Land.

—— *Dutton* v. *Morrison* (17 Ves. 193) distinguished - - - - - 125
See Creditor holding Security. 2.

—— *Higginsor* v. *Blockley* (1 Jur. (N.S.) 1104) disapproved of - - - 673
See Interrogatories by Defendant.

—— *Hills* v. *Croll* (2 Ph. 60), observations on 654
See Covenant in Restraint of Trade.

—— *Jeffreys* v. *Machu* (29 Beav. 344) distinguished - - - - 190
See Presumption of Grant of Reversion.

—— *Joyce* v. *De Moleyns* (2 J. & Lat. 374) followed - - - - 143
See Deposit of Deeds.

—— *Mann's Case* (Law Rep. 3 Ch. 459, n.) explained - - - - 31
See Infant Transferee.

—— *Martin's Patent Anchor Company* v. *Morton* (Law Rep. 3 Q. B. 306) commented on
See Bankrupt Shareholder. [274

—— *Metropolitan Counties Society* v. *Brown* (26 Beav. 454) distinguished - - 630
See Fixtures.

—— *Moss, Ex parte* (Law Rep. 3 Ch. 29) observed upon - - - - - 352
See Bankruptcy Appeal.

—— *Pennell* v. *Deffell* (4 D. M. & G. 372) considered - - - - 764
See Bankers' Account.

—— *Pentelow's Case* (Law Rep. 4 Ch. 178) distinguished - - - - 532
See Allotment of Shares. 2.

—— *Ponsford* v. *Walton* (Law Rep. 3 C. P. 167) followed - - - - 47
See Unstamped Creditors' Deed.

—— *Waring, Ex parte* (19 Ves. 345) distinguished [423
See Securities for Bills of Exchange.

—— *White* v. *Barker* (5 De G. & Sm. 746; 17 Jur. 174) followed - - - 336
See Partnership Accounts.

—— *White* v. *Lady Lincoln* (8 Ves. 363) distinguished - - - - 43
See Solicitor's Accounts.

CERTIFICATE — Appeal — Certificate of one counsel - - - - 561
See Certificate of One Counsel.

CERTIFICATE OF ONE COUNSEL—*Appeal Petition.*] Leave will not be granted to present a Petition of appeal with the certificate of only one counsel, merely on the ground that one counsel only appeared for the Appellants in the Court below. *In re* Roberts' Trust - - - 561

CHAMBERS, PRACTICE IN—Application to review taxation - - - - 372
See Taxation of Costs. 1.

CHARGE ON EQUITABLE DEBT—Garnishee 92
See Judgment Creditor.

CHARITY—College at University - - 722
See College.

—— Scientific societies, Gift to - - 309
See Marshalling. 2.

CHOICE OF ASSIGNEES—*Bankruptcy—Omission to choose Creditors' Assignee at First Meeting—Appeal by Creditor whose Proof was not formally complete at Date of Meeting—Proof of Debt by Declaration—Sufficiency of Statement of Account.*] Where the first meeting of creditors has passed without the choice of a creditors' assignee, by reason of the majority refusing to nominate any one for election, the Court has power to appoint a fresh meeting to continue the proceedings for the election of an assignee.—A creditor whose debt was not objected to at the meeting for choice of assignees, although not formally proved, may appeal from a decision come to at the meeting, provided his debt be proved before the hearing of the appeal.—If a creditor who proves his debt by declaration under the 144th section of the *Bankruptcy Act*, 1861, files a statement of account which is not "full, true, and complete," his proof ought to be rejected. *Ex parte* Barnett. *In re* Taylor - - - - - 68

COLLEGE—*Charity — Will — Construction—Education—Long Usage—Statutes of University Commissioners.*] A testator, in 1641, gave lands to *Sidney Sussex College, Cambridge*, and *Trinity College, Oxford*, for the only use, education in piety and learning, of ten descendants of the brothers and sisters of the testator and of his two wives, and in default of such to their poor kindred. —The two Colleges accepted the gift, and each had always required that those persons who claimed the benefit thereof should become members of the College, and be educated there, and when there were no such claimants, each College had appropriated a moiety of the rents to their own purposes:—*Held*, upon the construction of the will, that any descendants claiming the benefit of the gift must become members of one of the Colleges, and be educated there, and that, subject to that trust, the Colleges were entitled to the lands in equal moieties:—*Held*, also, that if the construction of the will had been doubtful, the contemporaneous usage might be referred to, and that the Court would not assume a long series of breaches of trust to have been committed.—The University Commissioners, in 1860, made a statute as to *Sidney Sussex College* that, subject to the legal rights of any persons beneficially interested under the will, the emoluments derived from the lands should be carried to the general funds of the

COLLEGE—*continued.*
College:—*Held*, that *Sidney Sussex College* took one moiety of the rents and profits freed from the charge of educating any descendants under the will, and that a scheme must be prepared as to the moiety taken by *Trinity College*.—Decree of the Master of the Rolls varied. ATTORNEY-GENERAL *v.* SIDNEY SUSSEX COLLEGE - 722

COMPANY — Acceptance of shares — Notice of allotment - - - 322, 325, n.
See ACCEPTANCE OF SHARES. 2, 3.

—— Allotment of shares—Conditional allotment [178, 532
See ALLOTMENT OF SHARES. 1, 2.

—— Amalgamation—*Ultrà vires* - 117, 503
See AMALGAMATION OF COMPANIES. 1, 2.

—— Bankrupt contributory—Set-off - 174
See SET-OFF IN WINDING-UP.

—— Bankrupt shareholder - - - 274
See BANKRUPT SHAREHOLDER.

—— Forfeited shares—Past holder - - 266
See FORFEITED SHARES.

—— Infant shareholder - - - 31
See INFANT TRANSFEREE.

—— Loan on deposit of shares - - 252
See TRANSFER OF SHARES. 2.

—— Misconduct of directors 376, 475, 701
See MISCONDUCT OF DIRECTORS. 1—3.

—— Misrepresentation in prospectus - 497
See MISREPRESENTATION IN PROSPECTUS.

—— Proof for calls on forfeited shares - 639
See FORFEITURE OF SHARES.

—— Qualified acceptance of shares—Building contract - - - - - 184
See ACCEPTANCE OF SHARES. 1.

—— Shareholder in another company - 252
See TRANSFER OF SHARES. 2.

—— Shares—*Stock Exchange* - 3, 200, 441
See CUSTOM OF STOCK EXCHANGE. 1—3.

—— Shares—Transfer - - - 20
See TRANSFER OF SHARES. 1.

—— Subscriber of memorandum—Paid-up shares
See SUBSCRIBER OF MEMORANDUM. [772

—— Transfer of shares—Laches - 769, n.
See LACHES OF COMPANY.

—— Transfer of shares—Laches - - 768
See LACHES OF CONTRIBUTORY.

COMPENSATION UNDER LANDS CLAUSES ACT —Reference—Enlargement of time 554
See ENLARGEMENT OF TIME FOR AWARD.

COMPULSORY POWERS — *Railway Company — Lands Clauses Act—Purposes of Special Act—Undertaking.*] A railway company obtained an Act of Parliament in 1864 for extending their operations, containing compulsory powers to take additional lands in connection with their undertaking. The Plaintiff's land was included in the deposited plans referred to in the Act. It was provided by the Act that a street called *Albert Street* should not be stopped up by the company without the consent of the vestry of the parish of *Islington*. In 1865, the company, having been unable to obtain the consent of the *Islington Vestry* to the stopping up of *Albert Street*, obtained another Act for the improvement of their *Highbury Station*, and for other purposes, by which it was recited

COMPULSORY POWERS—*continued.*
that it was expedient that the company should be empowered to stop up *Albert Street*, and also to acquire, by compulsion or otherwise, additional lands in connection with their undertaking, and the company was empowered to take the lands included in the deposited plans; and it was also enacted that they might stop up *Albert Street* provided that they made another street in a prescribed direction. None of the Plaintiff's land was included in the plans referred to in this Act. —The company, before the expiration of the compulsory powers of the Act of 1864, gave notice to the Plaintiff to take some of his land included in the plans referred to in that Act; although it was admitted that the land was wanted to form the new street under the provisions of the Act of 1865. The Plaintiff filed his bill for an injunction:—*Held* (affirming the decision of *James*, V.C.), that the Plaintiff was entitled to an injunction, the stopping up of *Albert Street* not being one of the purposes of the Act of 1864.—The Court will not construe the compulsory powers of a railway company so as to extend them beyond the express words or absolutely necessary implication of the Act; it being the duty of the company to take care that the public understand, before the Act is passed, the extent of the compulsory powers which they require.—Where a railway company has given notice to take land for some object which is clearly within their compulsory powers, the Court will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land. LAMB *v.* NORTH LONDON RAILWAY COMPANY - 522

CONDITION OF SALE — Misleading statement
See SETTLED ESTATES ACT. [230

CONDITIONAL ACCEPTANCE—Shares—Building contract - - - - 184
See ACCEPTANCE OF SHARES. 1.

CONDITIONAL ALLOTMENT—Repudiation 178,
See ALLOTMENT OF SHARES. 1, 2. [532

CONDITIONAL AUTHORITY—Directors—Bills of exchange - - - - 460
See NEGOTIABLE SECURITIES.

CONFLICT OF LAWS—Indian Registration Acts
See INDIAN REGISTRATION ACTS. [741

CONIES - - - - - 562
See "WARREN OF CONIES."

CONSENT—Settled Estates Act—Contingent remainderman - - - 230
See SETTLED ESTATES ACT.

CONSIGNEES—Pledge of bills of lading by 168
See MARSHALLING. 1.

CONSOLIDATED ORDERS—XL. r. 25 - 616
See TAXATION OF COSTS. 2.

CONTINUING DAMAGES—*Winding-up—Delay—Measure of Damages—Profits—Companies Act*, 1862, *s.* 158—*25th Rule of the General Order of 11 Nov.* 1862.] A ship-building company agreed to repair a ship within a certain time. Before the repairs were executed an order was made for winding-up the company. After some time an order was obtained in the winding-up, with the assent of the shipowners, that the official liquidator should be at liberty to complete the repairs,

CONTINUING DAMAGES—*continued.*

which he did, and the ship was, long after the time agreed upon, delivered to the owners and sent on a voyage:—*Held*, that the shipowners were entitled, under sect. 158 of the *Companies Act*, 1862, to recover damages from the company for the delay in executing the repairs, and that these damages continued to run after the winding-up, notwithstanding the 25th rule of the General Order of 11 Nov., 1862:—But, *held*, that, under the circumstances, the shipowners could not recover damages for an injury to the ship alleged to have been done whilst she was in the possession of the company.—Order of *Wood*, V.C., affirmed.—Order of *Giffard*, V.C., varied. *In re* Trent and Humber Company. *Ex parte* Cambrian Steam Packet Company - - 112

CONTRACT—Agent appointed by parol - 548
See Agent appointed by Parol.

CONTRACT COMPLETED BY ASSIGNEE—*Equitable Assignment—Moneys due under a Building Contract.*] A builder assigned to *T.* £200 of what should be coming to him under a building contract with *A.* The contract provided that the building should be finished by a certain day, and if not, that *A.* might employ another builder to complete it. When the assignment was made the time for completion had expired. Soon afterwards the builder executed a creditors' deed. The trustee of this deed completed the building with his own money and was repaid by *A.* Allowing this repayment as proper, nothing remained due on the contract. *T.* then filed his bill to enforce payment of the £200:—*Held* (affirming the decision of *Malins*, V.C.), that the payments by *A.* to the trustee were proper, and that the bill ought to be dismissed with costs. Tooth *v.* Hallett - - - - 242

CONTRIBUTORY—Acceptance of shares—Notice of allotment - - - 322, 325, n.
See Acceptance of Shares. 2, 3.

—— Allotment of shares—Conditional allotment [178, 532
See Allotment of Shares. 1, 2.

—— Amalgamated company—Director - 682
See Amalgamation of Companies. 3.

—— Bankrupt—Set-off—Mutual credit - 174
See Set-off in Winding-up.

—— Bankrupt shareholder - - - 274
See Bankrupt Shareholder.

—— Company shareholder in another company - - - - - 252
See Transfer of Shares. 2.

—— Creditors' deed—Liability to future calls—Proof - - - - - - 58
See Assent of Creditors. 1.

—— Forfeited shares—Past holder - 266
See Forfeited Shares.

—— Infant shareholder - - - 31
See Infant Transferee.

—— Laches of company - - 769, n.
See Laches of Company.

—— Laches of contributory - - 768
See Laches of Contributory.

—— Misrepresentation in prospectus - 497
See Misrepresentation in Prospectus.

CONTRIBUTORY—*continued.*

—— Qualified acceptance of shares—Building contract - - - - 184
See Acceptance of Shares. 1.

—— Repudiation of shares—Void amalgamation [503
See Amalgamation of Companies. 2.

—— Sale of shares—*Stock Exchange* 3, 200, 441
See Custom of Stock Exchange. 1—3.

—— Subscriber of memorandum—Paid-up shares
See Subscriber of Memorandum. [772

—— Transfer of shares—Laches - - 768
See Laches of Contributory.

—— Transfer of shares—Laches of company
See Laches of Company. [769, n.

—— Transferee dead without representative 768
See Laches of Contributory.

CO-OWNERSHIP OF REAL ESTATE—*Investment of Profits in Land—Partnership—Real or Personal Estate.*] Co-owners of lands, partly customary freehold and partly leasehold, worked a quarry on part of them, and let the rest to agricultural tenants. Part of the undivided profits were from time to time laid out in purchases of other lands for purposes of the quarry, the lands so purchased being, in most cases, conveyed to trustees on trust for the persons expressly by name who were interested in the undivided profits constituting the purchase-moneys, their heirs and assigns, and being in other cases conveyed to trustees without any express declaration of trust. One of the co-owners (a woman) married, and on her marriage a settlement of her shares and interest in the lands and quarry, plant and machinery, was executed, by which her shares and interest in the customary freeholds were treated as real estate, and her shares and interest in the entire property, both real and personal, were settled on herself for life for her separate use without power of anticipation, with remainder to her husband for life, with remainder, in default of issue, in trust for her, her heirs, executors, administrators, and assigns. Further purchases of customary freehold land were, after her marriage, made from time to time out of the undivided profits of the quarry, the land so purchased being conveyed to trustees, but without any trusts being declared, except in one instance, that of a purchase made in 1849, in which case trusts were expressed on the instrument of conveyance, and were for the benefit of the co-owners, by name, in undivided shares, their heirs and assigns. In the books of account kept by the manager of the business these purchases were treated as if they had been purchases of stock in trade. These accounts were from time to time submitted to the parties interested, and, in particular, to the husband of the married woman. She having died without issue:—*Held* (affirming the decision of the Master of the Rolls), that her share in the purchases of land so made after her marriage devolved as real estate, and not as personalty, and having been made with savings of income, were not comprised in the settlement, but passed at once on her death to the Plaintiff, her heir-at-law and customary heir. Steward *v.* Blakeway 603

COSTS—Appeal for—Costs of trustees - 697
See Appeal for Costs. 2.

COSTS—*continued.*

—— Appeal for—Motion to commit - 264
See APPEAL FOR COSTS. 1.

—— Appeal—Representative case - - 748
See LLOYD'S BONDS.

—— Mortgagor and mortgagee—Just allowances
See JUST ALLOWANCES. [304

—— Motions—Whether costs in cause - 372
See TAXATION OF COSTS. 1.

—— Official liquidator - - - 322
See ACCEPTANCE OF SHARES. 2.

—— Transfer of cause - - - 415
See TRANSFER OF CAUSE.

COSTS IN LUNACY—*Practice—Lunatic Mortgagee—Reconveyance—Trustee Act—Vesting Order—Costs of Mortgagor.*] Where the committee of a lunatic mortgagee presents a Petition under the *Trustee Act* for a reconveyance of the mortgaged estate to the mortgagor, the mortgagor is not entitled to his costs out of the lunatic's estate, even though served with the Petition. *In re* PHILLIPS [629

COSTS OF SUIT WHICH IS STAYED—*Practice—Administration Suit—Costs of Plaintiff whose Suit is stayed.*] *W.* filed a creditors' bill to administer *C.'s* estate. An administration decree having shortly afterwards been made in a second suit, an order was made staying proceedings in the first suit, and directing *W.'s* costs to be taxed, and to be paid by the executrix out of the assets. An order on further consideration was made in the second suit, ordering payment, first, of the costs of the executrix, and then of the Plaintiff; but not providing for *W.'s* costs. *W.* then applied by summons for an order for payment of his costs of the first suit. He was offered an order for payment of them *pari passu* with the costs of the Plaintiff, but declined it. Upon which his application was refused. *W.* then appealed:—*Held*, that the order for payment of *W.'s* costs by the executrix out of the assets did not give them priority over the costs of the second suit; and that as *W.* had refused to accept an order giving him all he was entitled to, his appeal must be dismissed. *In re* CLARK. CUMBERLAND *v.* CLARK [412

COUNSEL—Certificate of—Appeal - - 561
See CERTIFICATE OF ONE COUNSEL.

COUNTY COURT—Jurisdiction of County Court—Bankruptcy—Amount of debts - 648
See COUNTY COURT JURISDICTION.

COUNTY COURT BANKRUPTCY ORDERS, 1863, RULE 46 - - - - 648
See COUNTY COURT JURISDICTION.

COUNTY COURT JURISDICTION—*Bankruptcy—Affidavit that Debts do not exceed £300—County Court Bankruptcy Orders, 1863, Rule 46—Bankruptcy Act, 1861, s. 94.*] Where a debtor petitions for adjudication of bankruptcy in the County Court it is not necessary that he should wait till he has ascertained with absolute certainty the amount of his debts; it is sufficient if he makes a *bonâ fide* estimate of their probable amount. And if the debts should turn out to exceed £300 the bankruptcy will not be annulled if he took reasonable pains to ascertain their true amount. Therefore, where a debtor, under the advice of his

COUNTY COURT JURISDICTION—*continued.*

solicitor, estimated the amount of a bill of costs to which he was liable at £55, and on taxation it proved to be £85, which brought the amount of his debts above £300, it was *held* that he was not wrong in not waiting for the taxation, and that the bankruptcy ought to be proceeded with in the County Court. The decision of a County Court Judge annulling a bankruptcy under the 46th rule of the County Court Bankruptcy Orders, 1863, is subject to be reviewed by the Court of Appeal. *Ex parte* ROSE. *In re* ROSE - - - 648

COVENANT—Restraint of trade - - 654
See COVENANT IN RESTRAINT OF TRADE.

—— Running with land—Land released by covenantor—Notice - - - 218
See COVENANTS RUNNING WITH THE LAND.

COVENANT IN RESTRAINT OF TRADE—*Negative Stipulation.*] The Plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but the Plaintiff did not enter into any covenant to supply it. The Defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house which he supplied with his own beer. The Plaintiff filed his bill to restrain the Defendant from supplying beer, alleging that the Plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price:—*Held* (affirming the order of *Stuart*, V.C., overruling a demurrer), that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual, and that, though it was in terms positive, it was in substance negative, and that the Court could interfere by injunction to restrain the Defendant from acting in contravention of it.—Observations on *Hills* v. *Croll* (2 Ph. 60). CATT *v.* TOURLE - - 654

COVENANTS RUNNING WITH THE LAND—*Restrictive Covenants—Assigns.*] *A.* sold part of an estate to *B.*, who entered into restrictive covenants for himself, his heirs and assigns, with *A.*, his heirs, executors, and administrators, as to buildings on the purchased property; but *A.* did not enter into any covenants as to the land retained. After this *A.* sold to other persons various lots of the part retained, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by *B.* After this *A.* bought back from *B.* what he had sold to him:—*Held* (affirming the decision of the Court of Chancery of the Duchy of *Lancaster*), that the benefit of *B.'s* covenants did not in equity pass to the subsequent purchasers of other parts of the estate from *A.*, and that *A.*, after the re-purchase, could make a title to the re-purchased land discharged from the covenants.—*Child* v. *Douglas* (Kay, 560) considered. KEATES *v.* LYON - - - - - 218

CREDITOR HOLDING SECURITY—*Bankruptcy—Creditors' Deed—Proof—Security belonging to Bankrupt and a Third Person.*] A firm in *Charleston* applied to a firm in *Liverpool* to raise the necessary funds for the purchase of cotton in *America*

CREDITOR HOLDING SECURITY—*continued.*

for sale in *England*, at the risk of certain speculators for whom they acted, and the *Liverpool* firm applied to an English bank for an advance for that purpose. An arrangement was accordingly made, under which the *Charleston* firm drew upon an American branch of the bank for the amount required, purchased the cotton, consigned it to the *Liverpool* firm, drew bills upon that firm, and indorsed them to the bank. At the same time the cotton was consigned to the *Liverpool* firm, who accepted the bills drawn upon them by the *Charleston* firm, and the bills of lading were indorsed by the *Charleston* firm to the bank as security for their advance. Afterwards the *Liverpool* and *Charleston* firms became insolvent. The value of the cotton was insufficient to cover the acceptances of the *Liverpool* firm:—*Held*, that the transaction was a joint adventure of the *Charleston* and *Liverpool* firms, and that they were jointly interested in the cotton, and consequently that the bank could prove against the estate of the *Liverpool* firm for the sum advanced without giving up their security. *Ex parte* English and American Bank *In re* Fraser, Trenholm, & Co. - - - 49

2. —— *Inspectorship Deed—Bankruptcy Act*, 1861, *ss.* 192, 197—*Execution against Property of the Partners Members of another Firm—Time at which Amount of Debt is to be ascertained—Registration.*] A firm in *England* accepted bills drawn by a firm in *Egypt* which consisted of the members of the English firm and two other persons. Afterwards the English firm executed an inspectorship deed, which was duly registered under the *Bankruptcy Act*, 1861. The deed contained no assignment of the assets of the firm, but provided that the partners should get in all their joint and separate estates under inspection, and that the proceeds should be distributed by the inspectors in like manner as under an adjudication of bankruptcy of the same date as the deed. It was also provided that every creditor should, if required, make a statement of his debt and of any satisfaction or security for the same; and also that no creditor who had obtained execution against any part of the estate of the debtors, or any, or one of them, should be allowed the benefit of the execution and of the deed without bringing the amount received into general division. In the interval between the execution and registration of the deed the holders of some of the bills, amounting to £10,000, obtained an execution against the Egyptian firm, as drawers, in an action on one of the bills in the Consular Court, and recovered £3000. For some time after the registration of the deed the holders of the bills refused to come in under the deed, and made no claim; but eventually they claimed a dividend on the whole debt of £10,000. The inspectors resisted the demand on the grounds:—1. That the creditors ought to elect either to give up their claim or else bring in the proceeds of their execution. 2. That if any claim was admitted they ought to deduct the £3000 which they had recovered from the drawers:—*Held*, first, that as there was no bankruptcy of the English firm, and the deed contained no assignment of the estate of the partners, the deed did not affect the joint estate of the Egyptian firm, and that consequently the holders of the bills were entitled to prove under the deed without giving up the benefit of their execution.—*Dutton* v. *Morrison* (17 Ves. 193) distinguished.—Secondly: That the question whether the creditors had received satisfaction of any part of their debt must be determined with reference to the time when they made their claim, and not with reference to the date of the execution of the deed; and, consequently, that the sum recovered from the drawers must be deducted from their claim. *Ex parte* Egyptian Commercial and Trading Company. *In re* Kelson - - 125

3. —— *Creditors' Deed—Guarantee—Surety—Dividend on full Amount of Debt.*] A bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of £300, which guarantee provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bankruptcy. His banking account was overdrawn £410. The mortgage was realized, and the surety paid the bank the £300 secured by it:—*Held* (affirming the decree of *Malins*, V.C), that the bank was not restricted to proof for the balance of £110, but was entitled to receive dividends on the whole £410, not receiving in the whole, including the £300, more than 20*s.* in the pound. Midland Banking Company *v.* Chambers - - - 398

CREDITORS' DEED—Administration of trusts—Jurisdiction of Chancery - - 356
See Trusts of Creditors' Deed.

—— Assent of creditors—Amount of debt—Future calls - - - 58
See Assent of Creditors. 1.

—— Assent of creditors—*Bona fides*—Validity
See Assent of Creditors. 2. [87

—— Covenant not to sue debtor—Release of surety - - - - 204
See Release of Surety.

—— Guarantee—Dividend for full amount 398
See Creditor holding Security. 3.

—— Leave to issue execution - - 690
See Execution, Leave to issue.

—— Marshalling securities—Pledge of bills of lading by consignees - - 168
See Marshalling. 1.

—— Proof—Creditor holding security—Property of bankrupt and a third person - 49
See Creditor holding Security. 1.

—— Proof—Execution against property of debtors members of another firm - - 125
See Creditor holding Security. 2.

—— Proof—Time of ascertaining amount of debt [125
See Creditor holding Security. 2.

—— Registration not conclusive as to validity 63
See Registration of Creditors' Deed.

—— Surplus—Resulting trust - - 204
See Release of Surety.

—— Unstamped and unregistered - - 47
See Unstamped Creditors' Deed.

CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Jobber's Liability.*] The Plaintiff, a holder of 200 shares in a company, by his brokers, contracted on the *Stock Exchange* for the sale of that number of shares to the Defendants, who were jobbers, for a future day called settling-day. Before the settling-day, the jobbers, on a day called the name-day, in accordance with the custom of the *Stock Exchange*, gave to the vendor's broker the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, and on settling-day handed them and the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime the company had stopped payment and was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase-money to the jobbers, and had received but not executed the deeds of transfer, and the Plaintiff, whose name remained on the list of shareholders, was obliged to pay calls of these shares.—The Plaintiff thereupon filed a bill against the jobbers, claiming indemnity against the calls:—*Held*, that the contract between the Plaintiff and the jobbers must be interpreted according to the rules of the *Stock Exchange*, and that after the jobbers had paid to the vendor his purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees, through their brokers, had received the transfers and paid their purchase-money to the jobbers, the liability of the jobbers ceased, and the bill was dismissed.—Decree of *Malins*, V.C., reversed. COLES *v.* BRISTOWE 3

2. —— *Sale of Shares—Privity—Indemnity.*] The Plaintiff, a holder of forty shares in a public company, agreed, through his brokers on the *Stock Exchange*, to sell that number to a jobber for £202 10*s*. The Defendant subsequently directed his broker to buy 100 shares; and, in accordance with the custom of the *Stock Exchange*, the name of the Defendant was passed to the Plaintiff's brokers as the purchaser of the forty shares. The Plaintiff executed a transfer deed of the shares to the Defendant, the consideration afterwards inserted by the Plaintiff's brokers being £145, which was the price the Defendant had agreed to pay. The Defendant paid to the Plaintiff the £145, and received the deed and the share certificates, the difference between the £145 and £202 10*s*. being paid by the jobber.—The Defendant never executed the deed, or registered the transfer, or repudiated the sale, and the company was ordered to be wound up:—*Held*, that there was a contract between the Plaintiff and the Defendant, entitling the Plaintiff to indemnity by the Defendant.—Decree of the Master of the Rolls affirmed. HAWKINS *v.* MALTBY - - - - 200

3. ——*Sale of Shares—Indemnity—Registration guaranteed.*] A firm of stock-jobbers agreed on the *Stock Exchange* to buy 100 shares for a certain day, and on the sale-note were the words "with registration guaranteed." The jobbers, before the day, gave the name of a transferee, who duly paid the purchase-money; the seller executed the deed of transfer, and delivered it to the transferee. The transferee never registered the

CUSTOM OF STOCK EXCHANGE—*continued.*

transfer, and calls were made upon the seller, who filed a bill against the jobbers for indemnity, and had since died:—*Held*, that the jobbers were liable to indemnify the estate of the seller.—Decree of *Giffard*, V.C., affirmed. CRUSE *v.* PAINE 441

DAMAGES—Proof for, in winding-up—Continuing damages - - - 112
See CONTINUING DAMAGES.

DEBT—Novation of - - - - 662
See NOVATION OF DEBT.

DEBTS—Woman before marriage—Equity to settlement - - - - 247
See EQUITY TO SETTLEMENT.

DEEDS—Deposit of title deeds - - 143
See DEPOSIT OF DEEDS.

DELAY—Contract delayed by winding-up—Proof for damages - - - - 112
See CONTINUING DAMAGES.

—— Dissentient shareholders — Amalgamation [117
See AMALGAMATION OF COMPANIES. 1.

DELIVERY OF DEEDS—Equitable Mortgagee
See DEPOSIT OF DEEDS. [143

DELUSIVE DIVIDEND - - - - 475
See MISCONDUCT OF DIRECTORS. 2.

DEPOSIT OF DEEDS—*Equitable Mortgage by Trustee without Notice—Delivery up of Deeds—Purchaser for Value without Notice.*] Where the Court establishes a prior equitable title to an estate as against a person who took an equitable mortgage by deposit of the title deeds from the legal owner without notice:—*Semble*, it will go on to order him to deliver up the deeds, though he acquired them for value and without notice from the person who at law was the absolute owner of them.—*Joyce* v. *De Moleyns* (2 J. & Lat. 374) considered. NEWTON *v.* NEWTON - - 143

DIRECTORS—Amalgamated company - 682
See AMALGAMATION OF COMPANIES. 3.

—— Authority to accept bills of exchange—Conditional authority - - 460
See NEGOTIABLE SECURITIES.

—— Misconduct of - - 376, 475, 701
See MISCONDUCT OF DIRECTORS. 1, 2, 3.

—— Refusal to register transfer - - 20
See TRANSFER OF SHARES. 1.

DISCOUNT ON INSTALMENTS — Mortgage to building society - - - 207
See BUILDING SOCIETY.

DISCOVERY ANTICIPATING THE DECREE — *Practice—Exceptions.*] A Defendant cannot excuse himself from answering fully on the ground that the giving the discovery sought would anticipate the decree, such discovery being the same as that which would be ordered at the hearing if the Plaintiff obtained a decree.—Order of *James*, V.C., affirmed. CHICHESTER *v.* MARQUIS OF DONEGAL 416

DISSENTIENT SHAREHOLDERS—Amalgamation —*Ultrà vires* - - - 117
See AMALGAMATION OF COMPANIES. 1.

DIVERSION OF HIGHWAY—Railway Clauses Act - - - - - 194
See LEVEL CROSSING.

EASEMENT—Way of necessity - - 133
See Way of Necessity.

ENLARGEMENT OF TIME FOR AWARD—*Arbitration—Common Law Procedure Act*, 1854, *ss.* 8, 15—*Lands Clauses Act*, 1845, *s.* 23.] An award by an umpire under a reference pursuant to the *Lands Clauses Act* for ascertaining the amount of compensation having, on the application of the landowner, been set aside by the Court, and the matter referred back to the umpire, no proceeding was taken under the reference for nearly seven months from the date of the order, and the landowner then served the company with notice of his desire to have the compensation settled by a jury. The company applied to have the time for making the award extended:—*Held*, by *James*, V.C., that the provisions of the *Common Law Procedure Act*, 1854, with regard to remitting matters to the reconsideration of the arbitrator, and enlarging the time for making the award, applied to references under the *Lands Clauses Act*, and that the Court had jurisdiction to extend the time, but that after the delay which had taken place this jurisdiction ought not to be exercised so as to deprive the landowner of a trial by jury.—On appeal this decision was affirmed. *In re* Dare Valley Railway Company. - - - - 554

ENTRY OF DISCHARGE - - - 136
See Mortgage of Ship.

EQUITABLE ASSIGNMENT—Money due on building contract - - - 242
See Contract completed by Assignee.

EQUITABLE DEBT—Charge in equity by analogy to garnishee order - - 92
See Judgment Creditor.

EQUITABLE RELIEF—Bill for account—Patentee and machine maker - - 292
See Account of Patent.

EQUITY TO SETTLEMENT—*Debts before Marriage—Practice—Title of Official Assignee—Inchoate Title.*] Where a woman before her marriage is indebted, she is not entitled to any equity to a settlement out of her property until her debts incurred before her marriage have been provided for.—An official assignee filed a bill to impeach a settlement of part of the bankrupt's property. He was not formally appointed assignee of the bankruptcy until after the filing of the bill:—*Held*, that the official assignee had an inchoate title before the filing of the bill, and it was sufficient if he produced the order appointing him assignee at the hearing of the cause.—The decree of the Master of the Rolls affirmed. Barnard *v.* Ford. Carrick *v.* Ford - - - 247
—— Form and amount of settlement - 407
See Settlement by Court of Chancery.
——Lost by fraud - - - 591
See Fraud of Married Woman. 2.

EVIDENCE—Unstamped creditors' deed - 47
See Unstamped Creditors' Deed.

EXCEPTIONS—Discovery anticipating the decree [416
See Discovery anticipating the Decree.
—— Partnership accounts - - - 336
See Partnership Accounts.

EXECUTION—Leave to issue—Void creditors' deed - - - - - 690
See Execution, Leave to issue.

EXECUTION, LEAVE TO ISSUE—*Bankruptcy—Application for leave to issue Execution notwithstanding Creditors' Deed—Delay in impeaching Deed—Proceedings at Law.*] A creditor obtained judgment against his debtor on the 1st of August, 1868. On the same day the debtor executed a deed of composition with his creditors whereby he assigned all his property to a trustee by way of security for payment of the composition. The deed was registered under the 192nd section of the *Bankruptcy Act*, 1861. The creditor refused to assent to the deed, and proceeded to sue out execution; but the sheriff interpleaded, and the issue was tried between the creditor and the trustee of the deed. The Court of Exchequer decided, on the 23rd of January, 1869, that the deed was invalid as a trust deed under the 192nd section of the *Bankruptcy Act*, 1861, as the requisite number of assents had not been obtained; but that it operated at law as an assignment of the debtor's property to the trustee, and, consequently, that the issue must be decided against the creditor. The creditor accordingly, without further delay, proceeded to examine the debtor in bankruptcy in order to impeach the deed, and on the 6th of April applied under the 198th section of the *Bankruptcy Act* for leave to issue execution notwithstanding the deed:—*Held*, that as the creditor had throughout the proceedings at law insisted on the invalidity of the deed, he had been guilty of no delay in not sooner impeaching the deed in bankruptcy, and his application was granted. *Ex parte* Osenton. *In re* Prior 690

EXECUTOR—Payment to one - - 433
See Payment to One Executor.
—— Solicitor paying himself out of assets 616
See Taxation of Costs. 2.

EXECUTORS' ACCOUNTS—Solicitors' charges 616
See Taxation of Costs. 2.

EX PARTE WARING, (19 Ves. 345)—Doctrine of [423
See Securities for Bills of Exchange.

EXPERT—Reference to - - - 146
See Nuisance by Public Body.

FIXTURES—*Bankruptcy—Part of a Machine—Rolls used in Rolling Mill—Straightening Plates—Weighing Machines—Mortgagor and Mortgagee.*] An iron manufacturer made an equitable mortgage of his rolling mills, of which he held a lease, and shortly afterwards became bankrupt. Besides the fixed machinery, the mills contained the following chattels used in the manufacture:—(1). A large number of duplicate iron rolls of various sizes made to be fitted into the machine, and used for different sizes of iron; some of these were fitted to the machine, and had been used, and others had not yet been fitted. (2.) Straightening plates, which were broad iron plates embedded in the floor for straightening the iron when taken out of the furnace. (3). Weighing machines, which were deposited in holes dug in the earth and lined with brickwork, so that the weighing plate was level with the surface of the ground, but which were not fixed to the brickwork:—*Held*, on a case stated in the bankruptcy between the mortgagees and the assignees.—First: That such of the rolls as had been fitted to the machine were fixtures, and passed to the mortgagees; but

FIXTURES—*continued.*
that such of the rolls as had not been fitted to it were not fixtures, and belonged to the assignees. —Secondly: That the straightening plates were fixtures, and passed to the mortgagees.—Thirdly: That the weighing machines were not fixtures, and belonged to the assignees.—*Metropolitan Counties Society* v. *Brown* (26 Beav. 454) distinguished. *Ex parte* ASTBURY. *Ex parte* LLOYD'S BANKING COMPANY. *In re* RICHARDS - 630

FOLLOWING TRUST FUND—Bankers' accounts. *See* BANKERS' ACCOUNT. [764

FORFEITED SHARES—*Company—Contributory —Past Members — Companies Act*, 1862, *s.* 38.] Shareholders in a company limited by shares transferred their shares within a year before the commencement of the winding up of the company. Calls were made on the transferees, which they failed to pay, and the shares were duly forfeited by the directors for the benefit of the company:—*Held* (affirming the decision of *Stuart*, V.C.), that the transferors were liable to be placed on the list of contributories as past members of the company. *In re* ACCIDENTAL AND MARINE INSURANCE CORPORATION. BRIDGER'S CASE AND NEILL'S CASE 266

FORFEITURE CLAUSE—*Forfeiture by Marriage—Cesser of Life Estate—Acceleration of Remainder.*] A testator appointed, under a general power, real estate, and devised other real estate to his wife and her assigns during her life, and after her death to his son, with a proviso that if his wife should "do, make, or execute any deed, matter, or thing whereby she should be deprived of the rents and profits, or the power or right to receive, or the control over the same, so that her receipt alone should be a sufficient discharge for the same, her life estate should cease and determine as fully and effectually as it would by her actual decease." By a codicil he gave his personal estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement:—*Held* (affirming the decision of the Master of the Rolls), that notwithstanding the limitation to her and "her assigns," and the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; and that the remainder both in the appointed and devised estates was accelerated. CRAVEN *v.* BRADY 296

FORFEITURE OF SHARES—*Bankruptcy—Proof —Secured Creditor.*] *A.* was a shareholder in a joint stock bank, the deed of settlement of which provided that if any shareholder did not, on demand, pay all moneys which he owed to the bank, the directors might declare his shares forfeited for the benefit of the other proprietors, but that he should, notwithstanding such forfeiture, remain liable to pay the full amount of his debt. The directors gave *A.* a notice on the 25th of November to pay on the 2nd of December a large sum which he owed them, in default of which his shares would be forfeited. On the 28th of November he filed a declaration of insolvency, and was adjudged bankrupt on the following day. On the 3rd of December the directors forfeited his shares. On the bank coming in to prove, the Commissioner held the forfeiture invalid, and admitted the proof for the amount of the debt less the value of the shares, as in the case of a secured creditor:—*Held*, on appeal, that the validity of the forfeiture, if questioned, must be tried in an independent proceeding, and that the proof must be admitted for the full amount of the debt, without prejudice to the right of the assignees to question the forfeiture. *Ex parte* RIPPON. *In re* ANDREW - - - 639

FRAUD OF MARRIED WOMAN—*Settlement on Female Infant — Wife's Real Estate — Notice — Solicitor for Mortgagor and Mortgagee—Concealment—Priority.*] In a settlement made on the marriage of a female infant, the husband covenanted that in case his wife attained twenty-one he would concur with her, if she would consent, and would use his utmost endeavours to induce her to concur with him, in settling her real estate. This was never done. In 1862, after the wife had attained her majority, the husband and wife mortgaged the wife's real estate to secure money advanced to the husband. The mortgagee was informed by the husband and wife that there was no settlement, and although the person who acted as solicitor for both parties was aware of its existence, he concealed it with the acquiescence of the husband and wife from the mortgagee. In 1865 the mortgagee discovered the existence of the settlement. The mortgage deed, by mistake, was not effectually acknowledged by the wife till after the mortgagee had received notice of the settlement:—*Held*, on a bill filed by the mortgagee, that in the face of the evidence of concealment the mortgagee was not affected by notice to the person who acted as his solicitor:—That although the wife's estate did not pass to the mortgagee till after he had received notice of the settlement, yet the misrepresentations of the wife constituted a fraud, which bound her estate, and prevented her from disappointing the mortgagee, and, consequently, the mortgagee had priority over the persons interested under the settlement.—Decree of *Stuart*, V.C., affirmed. SHARPE *v.* FOY 35

2. —— *Coercion by Husband.*] A woman, two months after her marriage, wrote and signed in her maiden name a paper dated before the marriage, and purporting to give to her husband, in consideration of the marriage, her reversionary interest in a trust fund. She signed this paper for the purpose of enabling him to borrow money on her reversionary interest; he threatening that if she did not sign it he would send her back to her relations, with whom she was on bad terms. The husband sold the reversionary interest, and shortly before completion, he being at the time in prison for debt, she signed and gave to the purchaser's solicitor a letter addressed to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the trust fund to her husband. Upon the determination of the life interest she claimed her equity to a settlement, on the ground that the paper being signed after marriage did not bind her. *Held*, by the Master of the Rolls, that though she had been a party to a fraud, yet as she had acted under the coercion of her husband, she was not responsible for it, and was entitled to her equity to a settlement:—*Held*, on appeal, that she had been guilty of a fraud, which prevented her claiming her equity to a settlement against the purchaser. *In re* LUSH'S TRUSTS - - - - 591

FRAUDS, STATUTE OF, s. 8—Agent appointed by parol - - - - - 548
See AGENT APPOINTED BY PAROL.

FRAUDULENT CONVEYANCE—13 *Eliz. c.* 5—*Fraudulent Preference—Bona Fides.*] A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the Court of Chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued:—*Held* (affirming the decision of *Stuart*, V.C.), that the deed was not void under the statute 13 Eliz. c. 5, notwithstanding the fact that it conveyed the whole of the debtor's property for the benefit of some of his creditors, and that it contained a proviso that the debtor should remain in possession for six months. ALTON *v.* HARRISON. POYSER *v.* HARRISON - - - - 622

FRAUDULENT PREFERENCE—Bona fides 622
See FRAUDULENT CONVEYANCE.

FREE WARREN - - - - 562
See "WARREN OF CONIES."

FREEHOLD OR LEASEHOLD—Presumption 190
See PRESUMPTION OF GRANT OF REVERSION.

GARNISHEE ORDER—Charge on equitable debt by analogy to - - - 92
See JUDGMENT CREDITOR.

GAS COMPANY—Injunction against for breaking up streets - - - - 71
See BREAKING UP STREETS TO LAY GAS-PIPES.

GENERAL ORDER OF APRIL, 1867 - 372
See TAXATION OF COSTS. 1.

GENERAL ORDER OF NOV., 1862, r. 25 - 112
See CONTINUING DAMAGES.

—— r. 26 - - - - - 14
See INTEREST ON DEBTS IN WINDING-UP. 1.

—— r. 58 - - - - - 627
See SOLICITOR'S LIEN. 2.

GRANT—Warren of conies - - - 562
See "WARREN OF CONIES."

GRANT OF REVERSION — Presumption—Long term - - - - - 190
See PRESUMPTION OF GRANT OF REVERSION.

GUARANTEE—Account at bankers—Creditors' deed—Dividend for full amount - 398
See CREDITOR HOLDING SECURITY. 3.

HOLDER OF BILL OF EXCHANGE - - 460
See NEGOTIABLE SECURITIES.

HUSBAND AND WIFE—Fraud of wife—Mortgage - - - - - 35
See FRAUD OF MARRIED WOMAN. 1.

—— Fraud of wife—Coercion by husband 591
See FRAUD OF MARRIED WOMAN. 2.

—— Settlement by Court—Form and amount 407
See SETTLEMENT BY COURT OF CHANCERY.

—— Wife's equity to settlement - - 247
See EQUITY TO SETTLEMENT.

ILLEGALITY—Company—Loan-notes—Penalties [748
See LLOYD'S BONDS.

IMPROPER INVESTMENT — *Breach of Trust—Acquiescence—Unknown Cestui que Trust—Joint and several Debt.*] A lady died in 1830, leaving a will by which she gave her personal estate in trust for her sister for life, with remainder to her three trustees and executors, to all appearance beneficially. She also left a codicil, by which she impressed the residue with trusts in favour of other persons after the death of the tenant for life. This codicil was not proved till 1841, but the trustees in the meantime appeared to regard the property as not belonging to themselves, though it was not shewn that they knew of the existence of the codicil. In 1834 the trustees invested part of the estate on an improper security. Two of the trustees were partners in the bank out of which the money was drawn to place it on this security. In 1840 the firm became bankrupt, and after this the security turned out insufficient. The tenant for life died in 1842:—*Held* (reversing the decision of the Commissioner), that the persons claiming under the codicil were entitled to prove against the separate estate of one of the bankrupt trustees for the loss occasioned by the improper investment. *Ex parte* NORRIS. *In re* BIDDULPH [280

—— Stock mortgage - - - - 513
See WILFUL DEFAULT.

INCHOATE TITLE—Official assignee before appointment - - - - 247
See EQUITY TO SETTLEMENT.

INCOME—Wilful default as to—Parties - 513
See WILFUL DEFAULT.

INDEMNITY—Sale of shares—Custom of *Stock Exchange* - - - 200, 441
See CUSTOM OF STOCK EXCHANGE. 2, 3.

INDIAN REGISTRATION ACTS, 1864 and 1866—*Conflict of Laws—Registration—Lex fori—Lex rei sitæ.*] The *Indian Registration Act*, 1866, makes void all instruments relating to real estate in *India* which ought to have been registered under the *Indian Registration Act*, 1864, but were not so registered, and destroys all equities arising out of them.—*A.* being resident at *Madras*, in 1865 executed a deed by which he conveyed land in *India* to the Plaintiffs and covenanted for further assurance. The deed was not registered under the *Indian Registration Act*, 1864, which provides that if such a deed be not registered it shall not be received in evidence in any Court in *India*. In 1866 *A.* mortgaged the same land to the Defendants, who had notice of the Plaintiffs' conveyance, and the Defendants registered the mortgage deed under the *Indian Registration Act*, 1866. The Plaintiffs filed a bill to enforce the covenant for further assurance against the Defendants:—*Held* (affirming the decision of *Giffard*, V.C.), that the Plaintiffs had no equity against the Defendants, and the bill was dismissed.—*Semble*, that independently of the operation of the *Indian Registration Act*, 1866, as the Plaintiffs' deed was forbidden by the *Indian Registration Act*, 1864, to be received in evidence in *India*, it could not be sued on in *England* either as a deed of conveyance or as a deed of covenant for further assurance. HICKS *v.* POWELL - - 741

INFANT—Confirmation of contract by - 31
See Infant Transferee.
—— Revivor against infants - 1, 445, 448
See Revivor and Supplement. 1, 4, 5.
—— Shareholder - - - - 31
See Infant Transferee.
—— Ward of Court—Marriage after twenty-one
See Ward of Court. [345

INFANT TRANSFEREE—*Company — Confirmation, when presumed.*] *L.* transferred fifty shares in a company into the name of *H.*, an infant, not known by him to be such, who was also the transferee of a large number of other shares in the same company. *H.* was registered as the holder. *H.* attained twenty-one more than five months before the winding-up order, and in the interval transferred some of the other shares. He was settled on the list of contributories for the remaining shares, and did not at first raise the defence of his having been an infant, but four months afterwards took out a summons to have his name taken off the list on that ground. The official liquidator then applied to have the name of *L.* placed on the list instead of that of *H.*, in respect of the fifty shares:—*Held* (affirming the decision of the Master of the Rolls), that *H.* must be held to have affirmed the transaction after he came of age, and that the application must be refused.—A transfer to an infant is not void but only voidable.—*Mann's Case* (Law Rep. 3 Ch. 459, n.) explained. *In re* Blakely Ordnance Company. Lumsden's Case - - - - 31

INJUNCTION—Breaking up streets to lay gas-pipes - - - - - 71
See Breaking up Streets to lay Gas-pipes.
—— Noise—Crowds - - - - 388
See Noise.
—— Nuisance by public body—Reference to expert - - - - - 146
See Nuisance by Public Body.
—— Positive or negative stipulation - 654
See Covenant in Restraint of Trade.

INSOLVENCY—Securities for bills of exchange—Doctrine of *Ex parte Waring* (19 Ves. 345) [423
See Securities for Bills of Exchange.

INSPECTORSHIP DEED—Mutual credit clause—Set-off in winding-up - - 174
See Set-off in Winding-up.

INSTALMENTS—Mortgage to building society—Discount - - - - 207
See Building Society.

INTEREST—Debts under winding-up 14, 643
See Interest on Debts in Winding-up. 1, 2.

INTEREST ON DEBTS IN WINDING-UP—*Stoppage of Bank—Promissory Notes—Demand for Payment—26th Rule of General Order of November, 1862.*] In the voluntary winding up of a joint stock banking company, the creditors on deposit claimed interest at 4½ per cent., being an increase on the previous rate, by virtue of a resolution passed by the directors shortly before the stoppage of the bank, but not communicated to the depositors, and of a subsequent letter from the liquidator to the effect that the increased rate would be allowed:—*Held*, that the resolution of the directors, not having been communicated to the depositors, was inoperative; and that the liquidators had no power to make the bank liable for an increased rate of interest.—Interest was also claimed upon bank notes and drafts current at the time of the stoppage:—*Held*, that the claim made to the liquidator was a sufficient presentation and demand for payment, according to the law of merchants, and interest at 5 per cent. was allowed from the date of the claim.—The 26th rule of the General Order of November, 1862, is *ultrà vires*.—Order of *Malins*, V.C., varied. *In re* East of England Banking Company - - - - 14

2. —— *Proof—Debts carrying Interest.*] In the case of an insolvent company which is being wound up, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the winding-up, and it is only in the event of there being a surplus that they can have any claim for subsequent interest, in which case the dividends will be treated as applicable, first, in payment of interest, and then in reduction of principal. *In re* Humber Ironworks and Shipbuilding Company. Warrant Finance Company's Case - - 643

INTERPLEADER—Affidavit of no collusion 347
See Affidavit of no Collusion.

INTERROGATORIES—Distinction between interrogatories by Plaintiff and Defendant [673
See Interrogatories by Defendant.
—— Patent suit - - - - 673
See Interrogatories by Defendant.

INTERROGATORIES BY DEFENDANT—*Patent Suit—Exceptions—Practice.*] In answering interrogatories filed by a Defendant for the examination of the Plaintiff, the general rule applies that he who is bound to answer must answer fully.—Interrogatories for the examination of a Plaintiff are on a different footing from those for the examination of a Defendant in this respect, that a Plaintiff is not entitled to discovery of the Defendant's case, but a Defendant may ask any questions tending to destroy the Plaintiff's claim.—In determining whether a question is one of fact, and, therefore, to be answered, it makes no difference that it is asked with reference to a written document.—A Defendant in a suit for infringement of a patent, in order to prove that there was no novelty in the Plaintiff's patent, interrogated the Plaintiff as to the inventions described in the specifications of previous patents, and asked him to shew in what respect they differed from his. The Plaintiff declined to answer these interrogatories on the ground that the questions were not questions of fact, and that they related to the Plaintiff's case; the Defendant excepted to the answer, and the exceptions were allowed.—A Plaintiff in a patent suit was required by interrogatories to set out a correspondence between himself and a third party, and also to state the particulars of the infringement of his patent on which he relied. He refused to answer these questions on the ground that the Defendant might obtain an order in Chambers to inspect the correspondence; and that he had sufficiently set out the particulars of the infringement in his bill.—*Held*, that these answers were sufficient.—Ques-

INTERROGATORIES BY DEFENDANT—*contd.*
tions respecting proceedings in a foreign Court relating to infringements of the Plaintiff's patent, *held* to be immaterial.—The order of *James*, V.C., varied.—An exception bad in part is not necessarily to be overruled.—*Higginson* v. *Blockley* (1 Jur. (N.S.) 1104) disapproved of. HOFFMANN *v.* POSTILL - - - - - 673

INVESTMENT — Improper — Breach of trust — Proof in bankruptcy - - 280
See IMPROPER INVESTMENT.

—— Partnership—Profits in land - - 603
See CO-OWNERSHIP OF REAL ESTATE.

JUDGMENT CREDITOR — *Equitable Debt — Garnishee Clauses of Common Law Procedure Act*, 1854—17 & 18 *Vict. c.* 125, *ss.* 60–66.] A judgment creditor cannot obtain a charge in Equity on an equitable debt by analogy to an attachment of a legal debt under the garnishee clauses of the *Common Law Procedure Act*, 1854.—A judgment debtor was entitled under a will to one-fourth of the profits of a business which was managed by trustees, subject to a condition of forfeiture if he alienated or charged his share. A sum of money arising from the business was standing at the bankers in the names of the trustees. The judgment creditor filed a bill to establish a charge against the money at the bankers representing the judgment debtor's share of past profits, by analogy to an attachment under the garnishee clauses of the *Common Law Procedure Act*:—*Held* (affirming the decision of the Master of the Rolls), that the bill could not be sustained.—*Semble*, if such a bill could be sustained, the filing of the bill would be the process analogous to the garnishee order, and the charge would affect the fund in the hands of the trustees from the date of the bill. HORSLEY *v.* COX - - - 92

JURISDICTION — Administration of creditors' deed
See TRUSTS OF CREDITORS' DEED. [356

—— Appeal — Patent Law Amendment Act — Order of Master of the Rolls - 784
See REGISTER OF PROPRIETORS OF PATENTS.

—— Concurrent of Bankruptcy and Chancery — Creditors' deed - - - 356
See TRUSTS OF CREDITORS' DEED.

—— County Court — Bankruptcy — Amount of debts - - - - 648
See COUNTY COURT JURISDICTION.

—— Lunacy — Chancery — Person of unsound mind - - - - 167, 782
See PERSON OF UNSOUND MIND. 1, 2.

—— Ward of Court—Marriage after twenty-one
See WARD OF COURT. [345

JURY—Lunacy—Withdrawal of demand for 653
See WITHDRAWAL OF DEMAND FOR JURY.

JUST ALLOWANCES—*Mortgagor and Mortgagee —Account.*] A mortgage deed provided that it should be a security not only for the principal sums advanced, and interest, but also for the costs of preparing the deed, and for all costs which might be incurred by the mortgagee in selling the property, or in any actions or suits relating to it. The mortgagor filed a bill to redeem, and a decree was made directing an account of what was due to the Defendant for principal and interest under the mortgage deed, and an account of sale-moneys, rents, and profits received by the Defendant. In taking the accounts the Defendant carried in a claim for costs incurred in legal proceedings relating to the property, which the Chief Clerk refused to entertain, and the Defendant then appealed from the decree:—*Held*, by *Selwyn*, L.J., that the decree was right, for that all costs properly incurred in the actions might be claimed under it as "just allowances":—*Held*, by *Giffard*, L.J., that the costs might be claimed under the decree as principal moneys due under the deed.—Decree of *Stuart*, V.C., affirmed. BLACKFORD *v.* DAVIS - - - - 304

JUST ALLOWANCES—*continued.*

LACHES—Company - - - 769, n.
See LACHES OF COMPANY.

—— Contributory - - - - 768
See LACHES OF CONTRIBUTORY.

—— Contributory—Misrepresentation in prospectus - - - - 497
See MISREPRESENTATION IN PROSPECTUS.

—— Creditors' deed—Delay in impeaching 690
See EXECUTION, LEAVE TO ISSUE.

LACHES OF COMPANY—*Contributory—Transfer of Shares — Non-registration.*] *B.* purchased shares, and left them for registration. The director whose turn it was to attend and inspect the transfers neglected his duty, and did not inspect *B.'s* transfer, which was, accordingly, not registered. The company was shortly afterwards wound up:—*Held*, that *B.* was not a contributory. *In re* JOINT STOCK DISCOUNT COMPANY. HILL'S CASE - - - - - 769, n.

LACHES OF CONTRIBUTORY—*Company—Contributory—Transfer of Shares—Non-registration—Transferee dead without Representative.*] *F.*, a registered holder of shares in a limited company, transferred them to *S.*, but the transfer was not registered, through the default of the company. An order was made to wind up the company in March, 1866, and in June *F.* appeared in person at Chambers on a summons to place him on the list of contributories, but no order was made on the summons. In June, 1867, *S.* died, and had no legal personal representative. In May, 1869, *F.* received notice from the official liquidator that his name was placed on the list of contributories. He then applied to have it removed:—*Held* (reversing the order of the Master of the Rolls), that there was no laches on the part of *F.*, and that his name must be removed from the list of contributories:—*Held*, also, that the fact that the transferee had no legal personal representative, and that, consequently, there was no person who could be put on the list in *F.'s* place, was not material. *In re* JOINT STOCK DISCOUNT COMPANY. FYFE'S CASE - - - 768

LANDLORD AND TENANT—Easement—Way of necessity - - - - 133
See WAY OF NECESSITY.

LANDS CLAUSES ACT — Compulsory powers — Purposes of Act - - - 522
See COMPULSORY POWERS.

—— s. 23—As to compensation—Reference 554
See ENLARGEMENT OF TIME FOR AWARD.

LEVEL CROSSING—*Railways Clauses Act*, 1845, *ss.* 16, 46, 53, 56—*Public Convenience—Attorney-General.*] If a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, according to sect. 46 of the *Railways Clauses Act*, 1845, but the highway may be diverted, under sects. 16, 53, and 56, to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge.—Decree of the Master of the Rolls affirmed. ATTORNEY-GENERAL *v.* ELY, HADDENHAM AND SUTTON RAILWAY COMPANY - 194

LEX FORI—Indian Registration Acts - 741
See INDIAN REGISTRATION ACTS.

LEX REI SITÆ—Indian Registration Acts 741
See INDIAN REGISTRATION ACTS.

LIABILITY—Directors of company 376, 475, 701
See MISCONDUCT OF DIRECTORS. 1, 2, 3.

—— Stock jobbers - - - - 3
See CUSTOM OF STOCK EXCHANGE. 1.

LIEN—Solicitor to official liquidator - 627
See SOLICITOR'S LIEN. 2.

—— *On deposit* - - - - 101
See SUB-CONTRACT.

LIMITATIONS, STATUTE OF—Mercantile Law Amendment Act, s. 10 - - 735
See MERCANTILE LAW AMENDMENT ACT.

LLOYD'S BONDS—*Penalties—Illegality*—7 & 8 *Vict. c.* 85, *s.* 19—*Costs.*] The holders of instruments under the seal of a railway company given with the knowledge of the shareholders, and acknowledging sums of money to be due from the company (called *Lloyd's* bonds) have, notwithstanding 7 & 8 Vict. c. 85, s. 19, which imposes penalties on a company for giving loan-notes or securities, a valid claim against the assets of the company for those sums of money so far as the company had the benefit of the sums of money in respect of which the instruments were given.—Where a penalty is imposed by an Act of Parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the Act.—When an order is varied on appeal, the costs of the appeal will not be allowed to the Appellant merely because his is a representative case.—Order of *Malins*, V.C., affirmed with a variation. *In re* CORK AND YOUGHAL RAILWAY COMPANY - - - - - 748

LUNACY—Costs of mortgagor—Lunatic mortgagee - - - - - 629
See COSTS IN LUNACY.

—— Demand for jury—Withdrawal - 653
See WITHDRAWAL OF DEMAND FOR JURY.

—— Person of unsound mind—Trustee Act [167, 782
See PERSON OF UNSOUND MIND. 1, 2.

MACHINERY—Trade fixtures - - 630
See FIXTURES.

MAIDEN NAME—Signing under, by married woman - - - - 591
See FRAUD OF MARRIED WOMAN. 2.

MARINE INSURANCE—Unstamped policy 611
See MUTUAL INSURANCE SOCIETY.

MARRIAGE—Forfeiture by - - - 296
See FORFEITURE CLAUSE.

MARSHALLING—*Securities—Bankruptcy—Creditors' Deed—Pledge of Bills of Lading by Consignees.*] A firm in *Ceylon* employed a firm in *England* as their agents and factors, the course of business being that the *Ceylon* firm consigned cargoes to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with *T.*, their broker, to secure a large debt due from them to him. The English firm became insolvent and executed a creditors' deed under the *Bankruptcy Act*, 1861, and then *T.* sold the coffee (which produced more than sufficient to cover the bills drawn against it) and enough of the other securities to satisfy his debt:—*Held*, that the *Ceylon* firm were entitled, as against the English firm in liquidation, to have the remaining securities in *T.*'s hands marshalled, and to have a lien thereon for the balance due to them upon the coffee transaction. *Ex parte* ALSTON. *In re* HOLLAND - - - 168

2. —— 9 *Geo.* 2, *c.* 36—*Charity—Royal Society—Direction to pay Charitable Legacies out of Pure Personalty.*] A testator, after giving several legacies, gave a legacy of £4000 to the *Royal Society*, £4000 to the *Royal Geographical Society*, and three other sums of £4000 to three other institutions, directed that all his charitable legacies should be paid out of his pure personalty, and bequeathed the residue of his property to the Plaintiffs, his executors, for their own use. The object of the *Royal Society* is "for improving natural knowledge," that of the *Royal Geographical Society* "the improvement and diffusion of geographical knowledge." The testator left pure personalty very much less than the amount of charitable legacies, a larger sum of mixed personalty, and a small real estate in *Madeira*:—*Held* (affirming the decision of *Stuart*, V.C.), that the *Royal Society* and the *Royal Geographical Society* were charitable institutions within the meaning of 9 Geo. 2, c. 36:—*Held* (varying the decision of the Vice-Chancellor), that the debts, funeral and testamentary expenses, and costs of suit, ought not to be thrown upon the mixed personalty in exoneration of the pure personalty, but ought to be apportioned rateably between the two funds. That the charities should then be paid out of the residue of the pure personalty so far as it would extend, and claim for the residue against the rest of the estate, such claim abating in the proportion which the mixed personalty bore to the proceeds of sale of the *Madeira* estate. BEAUMONT *v.* OLIVEIRA - - - 309

MEASURE OF DAMAGES—Proof in winding-up —Contract delayed by winding-up 112
See CONTINUING DAMAGES.

MERCANTILE LAW AMENDMENT ACT (19 & 20 *Vict. c.* 97), *s.* 10—*Statute of Limitations—Retrospective Enactment—Practice—Hearing Creditor on Appeal.*] The 10th section of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), is retrospective; and therefore, even where the cause of action has accrued before the statute was passed, no person is entitled to any time within which to commence an action beyond the time fixed by the

MERCANTILE LAW AMENDMENT ACT—*contd.*

Statute of Limitations, by reason of such person being beyond the seas when the cause of action accrued.—In an administration suit, where one creditor has appealed against the disallowance of a part of his claim, another creditor will not be allowed to argue, on the hearing of the appeal, against the disallowance of another claim by the same decree. PARDO *v.* BINGHAM - - 735

MISCONDUCT OF DIRECTORS—*Company—Misrepresentations — Repayment of Dividends — Losses.*] Though directors by misrepresenting the state of a company cause larger dividends to be paid than ought to have been paid, the shareholders as a body cannot make the directors liable to repay those dividends.—The deed of settlement of a banking company provided, that when one-fourth of the capital was lost, the directors should call a meeting, and the company should be dissolved. Considerably more than one-fourth of the capital was lost, and a meeting was called, at which the shareholders resolved to continue the bank. Further losses were made, but no such meeting was called again:—*Held*, that as the shareholders knew that the bank was going on after more than one-fourth of the capital was lost, the directors were not liable for continuing the bank.—The directors of a banking company are not liable to the company for including in their accounts as good, debts which were, in fact, bad, unless they can be fixed with knowledge of the fact.—Where the directors had misrepresented the state of the company, each shareholder might have his remedy against them at law; but the whole body of shareholders could not maintain a suit in equity to recover the money which they had lost from the directors.—A bill seeking to make the directors liable for misrepresenting the value of the assets of a company, alleged that they had included amongst the assets as good a sum advanced by them to a director who had died insolvent and without having repaid the sum; and the bill prayed that the Defendants might be declared liable for allowing directors and others to overdraw their accounts:—*Held*, that on such a bill, the directors could not be made liable for the sum so advanced and lost, on the ground that it had been improperly advanced.—Decree of the Master of the Rolls reversed. TURQUAND *v.* MARSHALL - - - - - - 376

2. —— *Company—Winding-up—Order to repay Dividend—Companies Act*, 1862, *ss.* 101, 165 *—What amounts to an Improper and Delusive Dividend—"Profits in Hand."*] The Court has summary power, under the 101st and 165th sections of the *Companies Act*, 1862, to order a contributory or director to repay a dividend declared and paid under a delusive and fraudulent balance sheet.—*In re Royal Hotel Company of Great Yarmouth* (Law Rep. 4 Eq. 244) disapproved of.—But the balance sheet of a company engaged in a hazardous trade will not be considered delusive and fraudulent merely because an estimated value was put upon assets of the company which were then in jeopardy and were subsequently lost, or because the company was obliged to borrow money to pay the dividend, provided the facts fairly appeared on the balance sheet and the balance fairly represented profits.—A company

MISCONDUCT OF DIRECTORS—*continued.*

was formed under the *Companies Act*, 1862, for running the blockade during the civil war in *America*. The articles provided that dividends should not be paid except out of profits, and that the directors should declare a dividend as often as the profits in hand were sufficient to pay £5 per cent. on the capital, subject to the resolutions of a general meeting. In 1864, a dividend was declared and sanctioned at a general meeting, and subsequently paid, upon a balance sheet in which a debt due from the *Confederate* government, and cotton in the *Confederate States*, and also ships engaged in running the blockade, were estimated at the full nominal value. All these assets were lost, and the company was wound up:—*Held*, that as the estimate was made *bonâ fide*, and the facts appeared truly in the balance sheet, the balance sheet was not delusive, and the dividend must be considered to have been made out of profits, although the company had actually to borrow the money to pay it.—The order of *Malins*, V.C., affirmed, but on different grounds. *In re* MERCANTILE TRADING COMPANY. STRINGER'S CASE. [475

3. —— *Speculative Purchase—Imprudent Conduct—Deed kept back—Capital Lost—Liabilities —Damages at Law.*] A company was formed for the purpose of buying the business of a firm of bill brokers, and by the memorandum of association the directors were empowered to buy it upon such terms and under such stipulations as to guarantee or otherwise as might be agreed upon. The prospectus referred to the memorandum of association and to a certain deed of covenant. By that deed the business was assigned to the company, and all accounts, except such as the directors should require to be reserved and excepted, were to be carried on by the company, and the partners in the business guaranteed that all debts due to the firm and taken over by the company were good. By a second deed of the same date, not mentioned or disclosed to the shareholders, assets of the firm to the nominal value of £4,213,896 were reserved and excepted, and provisions were made for guaranteeing payment by the partners of the balance which, after a certain period and under certain arrangements, should not be got in on this account. The company carried on business for some time, and then stopped payment.—A bill was filed by the company against the living directors and the executors of a deceased director stating these facts, and that the company had lost £1,500,000 by taking the liabilities of the business, and by the insufficiency of the guarantee, and charged that the directors had been guilty of a breach of duty in buying the business without obtaining the sanction of a general meeting, and in not taking mortgages on the property of the partners in order to secure the guarantee, but no fraud was charged against the directors:—*Held*, on demurrer by the executors of the deceased director, that as regarded any loss beyond the money placed in the directors' hands, the remedy, if any, was at law, by an action of negligence, which would not survive against executors; and that, as regarded the money placed in the hands of the directors, the bill did not shew more than imprudence; and, having regard to the absence of *mala fides*,

MISCONDUCT OF DIRECTORS—*continued.*
and to the powers of the directors, did not make a case of breach of trust against the deceased director:—That the purchase, however unwise, being within the powers given to the directors, they were not bound to call a meeting of shareholders:—That it was within the powers of the directors to have a second deed, and that whatever remedy an individual shareholder might have against the directors as having been misled by the keeping back of the second deed, there could be no relief on that account in this suit:—That the directors had a discretion, and were not liable for neglect in not taking mortgages on the property of the directors.—Demurrer allowed, reversing order of *Malins*, V.C. OVEREND, GURNEY, & Co. *v.* GURNEY - - - - 701

MISREPRESENTATION—Directors of company—Repayment of dividends - - 376
See MISCONDUCT OF DIRECTORS. 1.

—— Prospectus of company - - 497
See MISREPRESENTATION IN PROSPECTUS.

—— Vendor and purchaser—Extent of acreage
See SUB-CONTRACT. [101

MISREPRESENTATION IN PROSPECTUS—*Company — Winding-up — Contributory — Laches.*] Eleven shareholders of a company repudiated their shares, and refused to pay the calls thereon, on the ground that they had been induced to become shareholders by fraudulent misrepresentations in the prospectus of the company. One of the eleven, acting in conjunction with the other ten, filed a bill to be relieved from his shares; and it was agreed between the solicitors of the company and the ten that they should not be prejudiced by their not taking proceedings pending the suit. A decree was made in favour of the Plaintiff in the suit, and was affirmed on appeal. Pending the appeal, and while the names of the ten remained on the register of shareholders, the company was ordered to be wound up:—*Held*, in the case of one of the ten, that he was not liable as a contributory of the company.—The order of the Master of the Rolls affirmed. *In re* ESTATES INVESTMENT COMPANY. PAWLE'S CASE - - - - - 497

"MONEY"—*Will — Construction — Proceeds of Policy.*] Testator gave to his wife "any money that he might die possessed of, or which might be due and owing to him at the time of his decease":—*Held* (reversing the decision of *Stuart*, V.C.), that the moneys receivable under a policy of assurance on his own life to which the testator was entitled, passed under the above bequest. PETTY *v.* WILLSON - - - - 574

MORTGAGE — Building society — Discount on future instalments - - - 207
See BUILDING SOCIETY.

—— Fixtures—Machinery - - - 630
See FIXTURES.

—— Just allowances - - - - 304
See JUST ALLOWANCES.

—— Married woman's estate—Fraud—Priority
See FRAUD OF MARRIED WOMAN. 1. [35

—— Payment to person not authorized by mortgagee - - - - 288
See PAYMENT OF MORTGAGE DEBT.

MORTGAGE—*continued.*
—— Solicitor acting for mortgagor and mortgagee—Notice - - - 35
See FRAUD OF MARRIED WOMAN. 1.

—— Stock mortgage — Offer by Plaintiff to transfer stock - - - 402
See STOCK MORTGAGE.

—— Trustee — Money advanced by—Right to foreclose - - - - 537
See MORTGAGE TO TRUSTEE.

MORTGAGE OF SHIP—*Entry of Discharge — Merchant Shipping Act*, 17 & 18 *Vict. c.* 104, *s.* 68.] The owner of a ship mortgaged her to *G.* for £1200, and the mortgage was on the same day transferred to *B.*, and the mortgage and transfer were registered. In October, 1863, *G.* paid *B.* £1200, and *B.* signed a receipt indorsed on the mortgage that the £1200 was received "in discharge of the within-written security." The usual entry of discharge was made in the registry. After a year *B.* re-transferred to *G.* this mortgage, and the registrar wrote in the margin of the register that the receipt had been made by mistake, a re-transfer only being intended. *G.* then transferred the mortgage to the Appellants by way of security, which transfer was registered, and in March, 1865, the moneys advanced were paid off, but no re-transfer executed, and the mortgage remained in the Appellants' hands. In May, 1865, the owner of the ship mortgaged her to *G.* by a deed registered on the following day, and this mortgage was transferred to the Plaintiff in November, 1865; but the transfer was not registered till July, 1866. In the meantime, in March, 1866, an agreement which never was registered was entered into between *G.* and the Appellants that *G.'s* original mortgage should be a security for the balance due from *G.* to the Appellants:—*Held* (affirming the decision of the Master of the Rolls) that the Plaintiff's security had priority over that of the Appellants:—*Held*, that *G.'s* first mortgage was discharged by the entry of discharge, and could not be revived by the memorandum that the receipt had been given by mistake, and that the new bargain between *G.* and the Appellants in March, 1866, not being registered, was of no effect against the Plaintiff. BELL *v.* BLYTH - - - - 136

MORTGAGE TO TRUSTEE—*Sale or Foreclosure —Leave to bid—Practice—Varying Minutes.*] By a deed of trust, property was conveyed to the sons of the settlor upon certain trusts for the benefit of the children and grandchildren of the settlor. The trustees had power to sell, and extensive powers of management, and provisions were made that any trustee advancing money to the settlor, or paying off any part of a certain mortgage debt, should be entitled to a charge by way of mortgage on the estate. One of the trustees advanced considerable sums to the settlor, and paid off part of the mortgage debt:—*Held*, on the construction of the deed, that the trustee was not entitled to have such a mortgage on the estate as would empower him to foreclose, and was entitled only to a sale:—*Semble*, that a trustee who is also mortgagee will not be allowed to foreclose. —Decree of *Giffard*, V.C., varied.—If any of the *cestuis que trust* object, a trustee of an estate, though also a mortgagee, will not be allowed to

MORTGAGE TO TRUSTEE—*continued.*
bid at a sale of the estate directed by the Court; but, *semble*, if the estate is not sold at the sale, the trustee may be allowed to become the purchaser under proposals to the Court.—Order of *James*, V.C., affirmed.—A party who is dissatisfied with the minutes of decree as prepared by the Registrar may move to have them varied, but the Lord Chancellor will not allow a cause to be set down to be spoken to on the minutes. Tennant *v.* Trenchard - - - - 537

MORTMAIN—Real estate in *Madeira* - 309
See Marshalling. 2.

MOTION TO COMMIT—Appeal for costs - 264
See Appeal for Costs. 1.

MUTUAL CREDIT—Bankrupt Law Consolidation Act, 1849—Set-off in winding-up 174
See Set-off in Winding-up.

MUTUAL INSURANCE SOCIETY — *Unstamped Policy*—35 *Geo.* 3, *c.* 63.] *S.* agreed by writing to become a member of an association each member of which on effecting an insurance on his own ship became bound to contribute to the loss of any other member. *S.* agreed to become a member in respect of an insurance for £300 on his own ship, but no stamped policy was ever executed. He contributed to the losses of other members, and his own ship having been injured he made a claim in respect of it, but before anything had been paid the association was ordered to be wound up:—*Held* (affirming the decision of *James*, V.C.), that under 35 Geo. 3, c. 63, no agreement for insurance of ships can be valid unless duly stamped according to that Act, that therefore there was no evidence of a binding mutual contract for insurance having been entered into, and that *S.* was not a contributory. *In re* London Marine Insurance Association, Smith's Case - - - - - 611

NEGLIGENCE — Mortgage — Payment to person not authorized - - - 288
See Payment of Mortgage Debt.

NEGOTIABLE SECURITIES—*Company—Bills of Exchange—Conditional Authority to accept—Bonâ fide Holder.*] The directors of a general trading company, part of whose business was to accept bills of exchange, and whose articles conferred the most extensive powers of management on the directors, passed a resolution authorizing the chairman to accept bills drawn on the company by *L.*, upon *L.'s* depositing securities to a certain amount. The chairman accordingly accepted the bills, and *L.* deposited some securities, but not nearly to the specified amount. The directors by resolution affirmed the transaction, but it did not appear that they knew that the requisite amount of securities had not been deposited. The bills were entered in the books of the company, and treated as binding on them. On the company being wound up, a *bonâ fide* holder of some of the bills claimed to prove:—*Held* (affirming the decision of the Master of the Rolls), that the proof ought to be admitted, for that the bills were binding on the company, as they had been accepted *modo et formâ* by the authority of the board of directors, and the provision as to the deposit of securities was a collateral matter, into

NEGOTIABLE SECURITIES—*continued.*
the observance of which a holder of the bills was not bound to inquire.—Consideration of the mode in which authority to accept bills on behalf of a company may be given. *In re* Land Credit Company of Ireland. *Ex parte* Overend, Gurney, & Co. - - - - - 460

NEXT OF KIN—Next of kin according to the statute, exclusive of A. - - 300
See "Next of Kin, exclusive of A."

"NEXT OF KIN, EXCLUSIVE OF A."—*Will—Construction—Next of Kin according to the Statute of Distributions, exclusive of A.*] A testator gave his estate to such of his three grandchildren, *S.*, *M.*, and *E.*, as should survive their father and attain twenty-five, but in case two only of them should die in the lifetime of their father or under twenty-five, and the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess should go to the person or persons, exclusive of the surviving grandchild, who, under the *Statute of Distributions*, would immediately on the decease of the survivor of the other two grandchildren be entitled to the testator's personal estate if he had then died intestate.—*S.* and *E.* died under twenty-five, *E.* being the survivor of the two, and at her death *M.* was the sole next of kin of the testator, supposing him to have died at that time:—*Held* (affirming the decision of the Master of the Rolls), that the persons who at the death of *E.* would have been the next of kin of the testator if *M.* also had then been dead, were entitled to file a bill for the administration of his estate. White *v.* Springett - - - - - 300

NOISE—*Nuisance — Injunction—Crowds—Statute* 25 *& 26 Vict. c.* 42 (*Sir J. Rolt's Act*).] A circus, the performances in which were to be carried on for eight weeks, was erected near the Plaintiff's house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten. It was proved that the noise of the music and shouting in the circus could be distinctly heard all over the Plaintiff's house, and was so loud that it could be heard above the conversation in the dining-room, though the windows and shutters were closed, and several persons were talking in the room:—*Held* (affirming the decision of *Malins*, V.C.), that this was such a nuisance as the Court would restrain by injunction.—If the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury. Inchbald *v.* Robinson. Inchbald *v.* Barrington - - - 388

NOTICE—Allotment of shares - 322, 325, n.
See Acceptance of Shares. 2, 3.

—— Husband and wife—Solicitor acting for both parties - - - - 35
See Fraud of Married Woman. 1.

NOVATION OF DEBT — *Debtor and Creditor.*] *S. & K.* gave to *G.* promissory notes to secure moneys advanced by him to them to enable them to carry on the works of a railway for which they were contractors. The notes were payable at five years from the completion of the railway. The moneys advanced were carried to the credit of *S. & K.* in their banking account with *G. & Co.*,

NOVATION OF DEBT—*continued.*
in which firm *G.* was a partner. The promissory notes were none of them given until after *S. & K.* had made over their business to a company, though some of the advances were made before. At the time when the notes were given, *G.* stated by letter that he looked to *S. & K.*, and knew nothing of the company in the matter. The company had the benefit of the advances. More than a year afterwards *G.* applied to the company for a year's interest, which the company paid, and at the same time sent to *G. & Co.* a cheque by *S. & K.* for the whole sum remaining to their credit, directing *G. & Co.* to place it to the credit of the company:—*Held* (reversing the decision of the Master of the Rolls), that, having regard to *G.'s* express repudiation of the company as his debtors, the subsequent circumstances were not enough to make them such, and that he had no right of proof against the estate of the company when wound up. *In re* SMITH, KNIGHT, & Co. *Ex parte* GIBSON - - - - 662

NUISANCE—Noise—Crowds - - - 388
See NOISE.

NUISANCE BY PUBLIC BODY — *Injunction — Nuisance—Form of Decree—Reference to Expert —15 & 16 Vict. c. 80, s. 42—Suspension of Injunction in difficult Cases—Information at the Relation of Local Board of Health.*] Where a Plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the Defendant can best remove it. The Plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the Defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to.—In such a case a reference before the decree to an expert under the 15 & 16 Vict. c. 80, s. 42, as to the existence of the injury, or as to the best mode of removing it, is improper. — Whether such a reference as to the best mode of removing the injury would be proper after the decree — *Quære.* —But when the difficulty of removing the injury is great, the Court will suspend the operation of the injunction for a time, with liberty to the Defendants to apply for an extension of time.—An information was filed at the relation of a Local Board of Health, praying for an injunction to restrain the visiting justices of a county lunatic asylum from allowing the sewage from the asylum to pollute a certain stream. The facts of the pollution of the stream existing, and being attributable in part to the sewage of the asylum, being proved, the Court granted an injunction; but suspended its operation for three months to enable the Defendants to make the necessary arrangements, with liberty to the Defendants to apply for an extension of time.—The decree of *Malins*, V.C., reversed. — If a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute.—It is no answer to an information at the relation of a Local Board of Health to abate a nuisance arising from sewage, that the Board has

NUISANCE BY PUBLIC BODY—*continued.*
power itself to remedy the evil by making sewers; because it is the duty of the Board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works. ATTORNEY-GENERAL *v.* COLNEY HATCH LUNATIC ASYLUM - - - - - 146

OFFER BY PLAINTIFF — Incapacity to fulfil offer - - - - - 402
See STOCK MORTGAGE.

OFFICIAL ASSIGNEE—Title before appointment *See* EQUITY TO SETTLEMENT. [247

OFFICIAL LIQUIDATOR—Costs - - 322
See ACCEPTANCE OF SHARES. 2.

—— Solicitor—Lien on file of proceedings 627
See SOLICITOR'S LIEN. 2.

ORDER NUNC PRO TUNC—Revivor 1, 2, n., 351
See REVIVOR AND SUPPLEMENT. 1—3.

PAID-UP SHARES—Subscriber of memorandum *See* SUBSCRIBER OF MEMORANDUM. [772

PARTIES—Bill charging wilful default - 513
See WILFUL DEFAULT.

—— Interested in profits of re-sale—Specific performance - - - - 101
See SUB-CONTRACT.

PARTNERSHIP—Accounts—Pleading — Exceptions to answer - - - 336
See PARTNERSHIP ACCOUNTS.

—— Profits—Investment in land - - 603
See CO-OWNERSHIP OF REAL ESTATE.

PARTNERSHIP ACCOUNTS—*Pleading—Answer —Exceptions—Amount received.*] A Defendant who, by answer, denies the Plaintiff's right to an account, but makes admissions sufficient for the purposes of the suit up to decree, cannot be required to give, by answer, further accounts.—A bill was filed by one partner to set aside an agreement under which the partnership had been dissolved, and alleged that the other partner had represented a certain debt to be bad which was not so. The interrogatories asked the Defendant to set forth what sums he had received in respect of this debt, and also to set out the partnership accounts. The Defendant, by his answer as to the debt, set forth the particulars as to a patent assigned to him by the debtors, and proceedings connected therewith, and said that he had received on account of his interest in the patent more than the amount of the debt; and by his answer as to the accounts the Defendant said that they were very extensive, that the Plaintiff had always access to the books, and that the Defendant had no means of giving the information sought except by referring to the books, and could only give the particulars required by employing an accountant, and submitted that he ought not to be obliged to set forth the accounts:— *Held* (affirming the decision of *Malins*, V.C.), that the answer was sufficient.—*White* v. *Barker* (5 De G. & Sm. 746; 17 Jur. 174) followed. LOCKETT *v.* LOCKETT - - - - - 336

PAST HOLDER OF FORFEITED SHARES 266
See FORFEITED SHARES.

PAST MEMBERS—Forfeited shares - 266
See FORFEITED SHARES.

PATENT—Priority—Provisional specification—Sealing patent - - - 577
See Provisional Specification.

—— Register of proprietors—Expunging entry—Appeal - - - - 784
See Register of Proprietors of Patents.

PATENT SUIT—Interrogatories by Defendant—Exceptions - - - - 673
See Interrogatories by Defendant.

PAYMENT OF MORTGAGE DEBT—*Transfer without Notice—Payment to a Solicitor not authorized by Mortgagee—Negligence—Foreclosure.*] *N. & T.*, who were mortgagees, transferred their mortgage to the Plaintiff, who gave no notice to the mortgagors. Afterwards the mortgagors, intending to redeem, paid the amount secured by the mortgage to the solicitors of *N. & T.* without ascertaining that they were authorized to receive it; the solicitors misappropriated the money. *N. & T.* executed a deed prepared by their solicitors, but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, and purported to convey the property by the direction of the mortgagors to their nominees. There was no proper receipt indorsed on the deed. The Plaintiff filed a bill of foreclosure against the mortgagors:—*Held* (affirming the decree of the Master of the Rolls), that the Plaintiff was entitled to the usual foreclosure decree. Withington *v.* Tate - - - 288

PAYMENT TO ONE EXECUTOR—*Executor or Trustee—Breach of Trust—Notice.*] A testator gave the residue of his estate to his two executors upon certain trusts. Part of his estate consisted of a bond given by the trustees of a minor who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly, in the place of the bond given by the trustees.—Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, and gave a receipt purporting to be signed by both the obligees, but, in fact, signed by one only, the signature of the other being a forgery.—In a suit by the other executor and *cestuis que trust* under the will against the obligor:—*Held*, that though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor as the obligees were executors:—*Held*, that under the circumstances the acceptance of a bond from the obligor in the place of the bond from his trustees was not a breach of trust by the executors.—Debtors to the estate of a testator will not, merely on account of the lapse of time, be held to have notice of the fact that all the debts are paid, and that the executors have become trustees. Charlton *v.* Earl of Durham - 433

PENALTY—Company—Loan-notes - 748
See Lloyd's Bonds.

PERSON OF UNSOUND MIND—*Practice—Trustee Act*, 1852, *s.* 1—*Lord Chancellor.*] Where the legal estate in land sold under the order of the Court is vested in a person of unsound mind, but not found lunatic, an order may be made by the Lord Chancellor on a Petition in Chancery, under the Trustee Acts, appointing a person to convey the legal estate so vested. Herring *v.* Clark [167

PERSON OF UNSOUND MIND—*continued.*

2. —— *Appointment of New Trustees—Trustee Act*, 1852, *s.* 10—*Lunacy—Jurisdiction.*] Where a Petition is presented under the Trustee Acts, 1850 and 1852, for the appointment of new trustees in the place of trustees some of whom are dead and the survivor a person of unsound mind, not so found by inquisition, the Petition may be presented in Lunacy only, and not in Chancery.—*In re Boyce* (12 W. R. 359) considered. *In re* Owen - 782

PLEADING—Exceptions to answer—Partnership accounts - - - - 336
See Partnership Accounts.

—— Offer by Plaintiff—Incapacity to fulfil offer [402
See Stock Mortgagee.

PLEDGE—Bills of lading—Consignees of cargo [168
See Marshalling. 1.

POLICY OF INSURANCE—Bequest of "money" [574
See "Money."

—— Unstamped policy - - - 611
See Mutual Insurance Society.

POWER—Appointment by gift of legacies 587
See Appointment by Gift of Legacies.

PRACTICE—Appeal—Administration suit—Creditor who has not appealed - 735
See Mercantile Law Amendment Act.

—— Appeal—Certificate of one counsel - 561
See Certificate of One Counsel.

—— Appeal for costs—Costs of trustees - 697
See Appeal for Costs. 2.

—— Appeal for costs—Motion to commit - 264
See Appeal for Costs. 1.

—— Appeal from order in Chambers - 616
See Taxation of Costs. 2.

—— Bankruptcy—Appeal from Registrar - 352
See Bankruptcy Appeal.

—— Costs of suit which is stayed - - 412
See Costs of Suit which is stayed.

—— Exceptions—Discovery anticipating the decree - - - - - 416
See Discovery anticipating the Decree.

—— Interpleader suit—Affidavit of no collusion—Undertaking as to damages - 347
See Affidavit of no Collusion.

—— Lunacy—Withdrawal of demand for jury [653
See Withdrawal of Demand for Jury.

—— Person of unsound mind—Trustee Act [167, 782
See Person of Unsound Mind. 1, 2.

—— Revivor—Infants - - 1, 445, 448
See Revivor and Supplement. 1, 4, 5.

—— Revivor—Marriage of Plaintiff - 351
See Revivor and Supplement. 3.

—— Revivor—*Nunc pro tunc* - 1, 351, 2, n.
See Revivor and Supplement. 1—3.

—— Sale by Court—Trustee—Leave to bid 537
See Mortgage to Trustee.

—— Taxation—Application to review - 372
See Taxation of Costs. 1.

—— Transfer of cause - - - 415
See Transfer of Cause.

—— Varying minutes - - - 537
See Mortgage to Trustee.

PRECATORY TRUST—*Will—Direction to provide Residence and Maintenance.*] A testator gave the residue of his personal estate to his son *T.*, and devised his real estate to *T.* for life, with remainders over, and appointed him sole executor. He then directed that his daughter *A.* should reside with, and be maintained by, *T.* so long as she should remain single and unmarried. *A.* lived sometimes in *T.'s* house, and was maintained by him, but afterwards left of her own accord and resided with her brother-in-law. After *T.'s* death she made a claim against his estate for maintenance:—*Held* (reversing the decision of *James*, V.C.), that *A.* was only entitled to maintenance so long as she resided with *T.*, he being willing to receive her; and that the obligation on *T.* to provide her with residence and maintenance did not extend beyond his life. WILSON *v.* BELL 581

PRESUMPTION—Grant of reversion—Long term [190
See PRESUMPTION OF GRANT OF REVERSION.

PRESUMPTION OF GRANT OF REVERSION—*Freehold or Leasehold.*] By an indenture of lease dated 1598 a farm was demised for 1000 years, with a covenant by the lessor to convey the fee simple to the lessee within five years if required. The farm was assigned as a leasehold in 1777, since which time it had been three times devised as freehold, and on the Court rolls of the manor of which the farm formed part the land was called freehold:—*Held*, that, under the circumstances, it remained leasehold as between the heir and the administrator of an intestate owner.—Order of the Master of the Rolls varied. *Jeffreys* v. *Machu* (29 Beav. 344) distinguished. PICKETT *v.* PACKHAM [190

PRIORITY—Costs in two suits - - 412
See COSTS OF SUIT WHICH IS STAYED.

—— Patent—Two provisional specifications of patent - - - - 577
See PROVISIONAL SPECIFICATION.

PRODUCTION OF DOCUMENTS—*Winding-up—Companies Act*, 1862, *s.* 115—*Bankers' Books.*] Shares in a company now in course of winding up had been transferred from *C.* to *N.* without consideration, *G.* being the active party in the transaction, and the subsequent calls had been paid with moneys supplied by *G.* The liquidators, considering it material to trace these moneys, applied for a summons calling upon the secretary of the banking company with whom *G.* kept his account, to attend for examination, and produce all books containing entries as to *G.'s* affairs. The Master of the Rolls was not inclined to issue the summons, but desired the point to be brought before the Lords Justices:—*Held*, that the summons might issue, it being left open to the witness, upon his attending the summons, to take any objections he might have to the inspection of the books. *In re* SMITH, KNIGHT, & CO. - - - 421

—— Solicitor's lien—Documents relating to company in liquidation - - 215
See SOLICITOR'S LIEN. 1.

—— Solicitor of official liquidator—File of proceedings - - - - 627
See SOLICITOR'S LIEN. 2.

PROOF UNDER WINDING-UP—Interest 14, 643
See INTEREST ON DEBTS IN WINDING-UP. 1, 2.

PROVISIONAL SPECIFICATION—*Patent—Sealing Patent—Priority—Patent Law Amendment Act*, 15 & 16 *Vict. c.* 83, *ss.* 6, 9, 10, 23, 24.] Leaving a provisional specification and obtaining provisional protection does not prevent a second applicant from leaving a provisional specification of a similar invention, and obtaining valid letters-patent for the invention before six months have elapsed from the time when the first provisional specification was left; and in such a case, letters-patent will not be granted to the first applicant for any part of his invention which is covered by the letters-patent already obtained by the second applicant. *Ex parte* BATES & REDGATE - 577

PUBLIC CONVENIENCE—Railway company—Level crossing - - - 194
See LEVEL CROSSING.

PUBLIC INJURY—Injunction—Motives of persons instituting suit - - 71
See BREAKING UP STREETS TO LAY GAS-PIPES.

PURCHASE WITHOUT NOTICE—Right to title deeds - - - - - 143
See DEPOSIT OF DEEDS.

PURE PERSONALTY—Mortmain—Land in *Madeira* - - - - - 309
See MARSHALLING. 2.

RAILWAYS CLAUSES ACT, 1845, ss. 16, 46, 53, 56 - - - - - 194
See LEVEL CROSSING.

RAILWAY COMPANY—Compulsory powers—Undertaking - - - 522
See COMPULSORY POWERS.

—— Level crossing—Public convenience - 194
See LEVEL CROSSING.

REAL ESTATE—Partnership—Profits—Investment in land - - - 603
See CO-OWNERSHIP OF REAL ESTATE.

REGISTER—Refusal of directors to register transfer - - - - - 20
See TRANSFER OF SHARES. 1.

REGISTER OF PROPRIETORS OF PATENTS—*Jurisdiction—Patent Law Amendment Act*, 1852, *s.* 38—*Right of Appeal from the Master of the Rolls.*] There is no right of appeal to the Court of Appeal in Chancery against an order made by the Master of the Rolls under the 38th section of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), to expunge an entry in the register of proprietors of patents. *In re* HORSLEY AND KNIGHTON'S PATENT - - - - - 784

REGISTRAR IN BANKRUPTCY—Appeal from
See BANKRUPTCY APPEAL. [352

REGISTRATION OF CREDITORS' DEED—*Bankruptcy Act*, 1861, *ss.* 199, 200—*Order for Registration not conclusive as to Validity—Refusal to Adjudicate.*] A creditor petitioned for adjudication against his debtor. On the following day the debtor gave notice of motion to stay proceedings and dismiss the petition. On the hearing of the motion, the debtor proved a deed registered under the 200th section of the *Bankruptcy Act*, 1861, before the Petition was presented, and an order of

REGISTRATION OF CREDITORS' DEED—*cont.*
a *London* Commissioner allowing it to be registered as complying with the provisions of the Act. The creditor proceeded to examine the debtor as to his creditors, in order to shew that the provisions of sect. 200 had not been complied with, but the examination was stopped on the ground that the order of the *London* Commissioner was conclusive; and an order was made dismissing the petition. The petitioning creditor appealed on the ground that the order was not warranted by sect. 199 of the Act, and on the ground of the examination having been stopped:—*Held*, that the Commissioner had jurisdiction to entertain the motion and to dismiss the petition, if satisfied that there was a deed of arrangement which would render an adjudication void:—But *held*, that the case must go back to the Commissioner for the examination of the debtor to proceed, the *ex parte* order of the *London* Commissioner not being conclusive evidence that the deed had been assented to as required by the Act. *Ex parte* National Bank of England. *In re* Van Wart - 63

RELEASE OF SURETY — *Release by Creditors —Covenant to pay Interest—Resulting Trust for Debtor.*] By a mortgage deed the debtor covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—*Held*, that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor.—*Semble*, that under such a deed of assignment there would be a resulting trust of any surplus for the debtor.—Decree of *Giffard*, V.C., affirmed. Green *v.* Wynn - - 204

REPUDIATION OF DEBTOR—Novation of debt
See Novation of Debt. [662

REPUDIATION OF SHARES—Conditional allotment - - - - 178, 532
See Allotment of Shares. 1, 2.

—— Void amalgamation - - - 503
See Amalgamation of Companies. 2.

RESIDENCE AND MAINTENANCE—Trust for 581
See Precatory Trust.

RESTRAINT OF TRADE—Uncertainty - 654
See Covenant in Restraint of Trade.

RESTRICTIVE COVENANTS—Land released by covenantor—Notice - - 218
See Covenant running with the Land.

RETROSPECTIVE ENACTMENT — - 735
See Mercantile Law Amendment Act.

REVIVOR AND SUPPLEMENT—*Practice—Infants —Nunc pro tunc*—15 & 16 *Vict. c.* 86, *s.* 52.] Where proceedings had been taken in a suit which was abated by the death of a party:—*Held*, that there was no jurisdiction to make an order against infant heirs to revive, and that they should be bound by the proceedings. Capps *v.* Capps - - 1

REVIVOR AND SUPPLEMENT—*continued.*

2. —— *Practice—Nunc pro tunc.*] Order to revive after several abatements and defects made *nunc pro tunc*. Mackenzie *v.* Gear - 2, n.

3. —— *Practice—Marriage of Plaintiff—Order Nunc pro tunc.*] A suit for administration was instituted in the name of three infants by their next friend. After this one of them, a female, married before decree. The next friend and the other parties to the suit were unaware of the marriage, and she and her husband were unaware of the existence of the suit until after a decree had been made.—Vice-Chancellor *Stuart* declined to make an order of revivor, considering that the defect could not be remedied without a supplemental bill; but, the Defendants consenting, an order of revivor was made by the Lords Justices. Griffin *v.* Morgan - - - - 351

4. —— *Practice—Infants*—15 & 16 *Vict. c.* 86, *s.* 52.] Where proceedings had been taken in a suit after it had become defective by the birth of children:—*Held*, that there was no jurisdiction to make a supplemental order under 15 & 16 Vict. c. 86, s. 52, bringing before the Court the children who were infants, and directing that they should be bound by the proceedings; but that a bill was necessary for the purpose. Auster *v.* Haines. 445

5. —— *Practice—Infants*—15 & 16 *Vict. c.* 86, *s.* 52.] Where, after an administration suit had been instituted, a child was born who took an interest in the property:—*Held*, that there was jurisdiction to make an order under 15 & 16 Vict. c. 86, s. 52, bringing the child before the Court and directing that he should be bound by the previous proceedings in the suit. Egremont *v.* Thompson - - - - - 448

ROLLING MILL—Fixtures - - - 630
See Fixtures.

ROLT'S ACT—Nuisance - - - 388
See Noise.

ROYAL GEOGRAPHICAL SOCIETY—Bequest to —Mortmain - - - 309
See Marshalling. 2.

ROYAL HUMANE SOCIETY—Bequest to—Mortmain - - - - - 309
See Marshalling. 2.

ROYAL SOCIETY—Bequest to—Mortmain 309
See Marshalling. 2.

SALE BY COURT—Trustee—Leave to bid - 537
See Mortgage to Trustee.

—— Trustee Act, 1852—Person of unsound mind
See Person of Unsound Mind. 1. [167

SECURITIES FOR BILLS OF EXCHANGE—*Double Insolvency—Claims of Bill holders—Ex parte Waring.*] *M.* borrowed money from the *R.* company, for which he accepted and gave to them bills of exchange, and deposited shares as a collateral security. When the bills became due *M.* wished the loan continued, and the managing director of the *R.* company sent him for acceptance fresh bills, with a letter stating them to be in place of those falling due. *M.* accepted the new set of bills on that footing. After this *M.* died insolvent, and the *R.* company was ordered to be wound up, and was admitted to be utterly insolvent. Both sets of bills had been negotiated, and were outstanding,

SECURITIES FOR BILLS OF EXCHANGE—*cont.*

The holders of the first set of bills applied to have such first set paid by means of the deposited shares, on the principle of *Ex parte Waring* (19 Ves. 345).—*Held*, by the Master of the Rolls, that the bill holders could not maintain any claim against the shares deposited.—*Held*, on appeal, that *Ex parte Waring* did not apply in favour of the holders of the first set of bills, for that the *R.* company after receiving the new bills in place of the old ones, were bound to indemnify *M.* against the old ones, and had no right to apply his shares in payment of them; but whether the principle of *Ex parte Waring* was not applicable in favour of the holders of the new bills, *quære*. *In re* GENERAL ROLLING STOCK COMPANY. *Ex parte* ALLIANCE BANK - - - 423

—— Marshalling securities - - - 168
See MARSHALLING. 1.

SET-OFF IN WINDING-UP—*Bankrupt Contributory—Mutual Credit—Companies Act*, 1862, *ss.* 75, 95—*Bankrupt Law Consolidation Act*, 1849, *s.* 171.] A contributory of a company in course of winding-up executed an inspectorship deed, the effect of which was to import the mutual credit clause of the Bankruptcy Act, 1849. At the date of the deed the contributory was the holder of three bills accepted by the company, which were shortly afterwards indorsed to an agent for collection. After the execution of the deed a call was made on the contributory to an amount exceeding that of the bills, and a few days later the bills matured:—*Held* (reversing the decision of the Master of the Rolls), that the bills could not be proved against the company, but must be set off against the call. *In re* ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY. CARRALLI & HAGGARD'S CLAIM - - - - - - 174

SETTLED ESTATES ACT (19 & 20 *Vict. c.* 120), *ss.* 17, 28—*Consent to Application for Sale—Contingent Remainderman—Specific Performance—Vendor and Purchaser—Doubtful Title—Condition of Sale.*] The persons whose consent is required by the 17th section of the *Settled Estates Act* to an application for a sale are persons whose consents are capable of being obtained. Therefore, where a freehold estate was limited in trust for *A.* for life, with remainder (subject to a general power of appointment by *A.*) in trust "for the person whom *A.* should leave her heir-at-law" in fee:—*Held* (reversing the decision of the Master of the Rolls), that an order for sale made on the application of *A.*, with the concurrence of the trustee of the settlement, was not invalid by reason of the non-concurrence of the unascertained contingent remainderman.—What constitutes a settled estate within the Act, considered.—Observations upon the effect of the 28th section in curing an informality in a sale made in pursuance of the Act.—In a suit for specific performance, a purchaser will be forced to take a title which appears to the Court of Appeal to be good, although the Judge of the Court below was of a different opinion; that fact not being sufficient to constitute a doubtful title.—A condition of sale which did not fairly state the objection to the title against which it was directed:—*Held* not to be binding on a purchaser. BEIOLEY *v.* CARTER 230

SETTLEMENT—Female infant - - 35
See FRAUD OF MARRIED WOMAN. 1.

—— Ward of Court—Marriage after twenty-one
See WARD OF COURT. [345

—— Wife's equity to—Debts before marriage 247
See EQUITY TO SETTLEMENT.

SETTLEMENT BY COURT OF CHANCERY—*Married Woman—Equity to a Settlement—Form of Settlement.*] A settlement was directed of three-fourths of a fund belonging to the wife of a bankrupt. Questions having arisen as to the proper form of the settlement:—*Held*, that the power of investment ought to be confined to the securities on which cash under the control of the Court may be invested:—*Held*, as regarded the limitations in the settlement, that it ought to be framed in a proper and usual way with regard to the interests of the wife and children, and without any particular regard to the interests of the assignee; and that a power of advancement which could be exercised in favour of children under age was proper, though objected to as injurious to the assignee, but the ultimate limitation in default of children should be to the assignee.—The settlement, as approved in the Court below, gave the fund in default of appointment to the children as tenants in common, without any qualification:—*Held*, that it ought to be altered, so that children dying under twenty-one and unmarried should not take interests transmissible to their representatives. SPIRETT *v.* WILLOWS - - 407

SHIP—Mortgage - - - - 136
See MORTGAGE OF SHIP.

SOLICITOR—Duty to keep accounts - 43
See SOLICITOR'S ACCOUNTS.

—— Executor—Paying himself out of assets 616
See TAXATION OF COSTS. 2.

—— Lien—Official liquidator—File of proceedings - - - - - 627
See SOLICITOR'S LIEN. 2.

—— Lien—Production of documents in winding-up - - - - - 215
See SOLICITOR'S LIEN. 1.

—— Misappropriation by - - - 764
See BANKERS' ACCOUNT.

—— Mortgagee—Payment to solicitor not authorized - - - - - 288
See PAYMENT OF MORTGAGE DEBT.

SOLICITOR'S ACCOUNTS—*Solicitors—Cash Account—Duty to keep Accounts.*] *L.* acted as solicitor for *N.* in various matters, and particularly in raising money for him on mortgages and bills of exchange. He also acted as receiver of *N.'s* rents. The course as to the transactions for raising money appeared to have been, that on each occasion *L.* received the money, retained out of it a sum agreed upon for his costs of that transaction, and handed over the balance. The rents which he received were all duly accounted for, and accounts settled, not including any items for costs. After the death of the solicitor a large bill of costs was sent in, which was referred for taxation. The Taxing Master required a cash account, but no sufficient materials existed for making it out, and the Taxing Master certified that nothing was due to the solicitor, inasmuch as he had received large sums of money, of his disposal of which no account was

SOLICITOR'S ACCOUNTS—*continued.*

furnished:—*Held*, (affirming the decision of the Master of the Rolls), that the bill of costs as taxed must be paid, for that the principle of *White* v. *Lady Lincoln* (8 Ves. 363) did not apply where the solicitor was not the general agent of the client, so as to be able to receive the client's moneys at all times without his knowledge, but only received money for him in respect of separate transactions of which the client was aware at the time, and knew what was to be received. *In re* LEE, A SOLICITOR. *Ex parte* NEVILLE - 43

SOLICITOR'S LIEN—*Winding-up—Production of Documents—Lien.*] Under 25 & 26 Vict. c. 89, s. 115, the solicitors of a company may be compelled, on a summons obtained by the official liquidator in the winding up of a company, to produce documents relating to the company, without prejudice to their lien for costs. *In re* SOUTH ESSEX ESTUARY AND RECLAMATION COMPANY. *Ex parte* PAINE AND LAYTON - - - 215

2. —— *Solicitor to Official Liquidator—File of Proceedings in the Winding-up—General Order of 11th Nov.* 1862, *Rule* 58.] The solicitor to an official liquidator has no lien for his costs on the file of proceedings in the winding-up and the documents relating thereto. A solicitor who had been employed by the official liquidator in the winding-up and afterwards discharged, was ordered to deliver up all such documents to the official liquidator.—Order of *Stuart*, V.C., affirmed. *In re* UNION CEMENT AND BRICK COMPANY. *Ex parte* PULBROOK - - - - 627

SPECIALTY DEBT—*Breach of Trust—Covenant.*] Where a trustee had executed a deed containing merely an appointment of him as trustee, and a declaration by him that he accepted the office:—*Held*, that no covenant by him would be implied, and that a claim for trust money received and misapplied by him would not constitute a specialty debt against his estate.—Order of *Stuart*, V.C., reversed. HOLLAND *v.* HOLLAND - - 449

SPECIFIC PERFORMANCE—Contract by agent—Appointment by parol - - 548
See AGENT APPOINTED BY PAROL.

—— Doubtful title - - - - 230
See SETTLED ESTATES ACT.

SPECIFICATION OF PATENT — Provisional — Priority - - - - 577
See PROVISIONAL SPECIFICATION.

SPECULATIVE PURCHASE—Misconduct of directors - - - - 701
See MISCONDUCT OF DIRECTORS. 3.

STATUTES:—

29 Car. 2, c. 3—*Frauds* - - - 548
See AGENT APPOINTED BY PAROL.

13 Eliz. c. 5—*Fraudulent Conveyances* - 622
See FRAUDULENT CONVEYANCE.

9 Geo. 2, c. 36—*Mortmain* - - 309
See MARSHALLING. 2.

11 Geo. 2, c. 19—*Landlord and Tenant* - 320
See APPORTIONMENT.—TENANT FOR LIFE AND REMAINDERMAN.

35 Geo. 3, c. 63—*Stamps* - - - 611
See MUTUAL INSURANCE SOCIETY.

STATUTES—*continued.*

4 & 5 Will. 4, c. 22—*Apportionment* - 320
See APPORTIONMENT.—TENANT FOR LIFE AND REMAINDERMAN.

1 Vict. c. 26, s. 27—*Wills* - - - 587
See APPOINTMENT BY GIFT OF LEGACIES.

7 & 8 Vict. c. 85, s. 19—*Railways* - 748
See LLOYD'S BONDS.

8 Vict. c. 18, s. 23—*Lands Clauses* - 554
See ENLARGEMENT OF TIME FOR AWARD.

8 Vict. c. 20, ss. 16, 46, 53, 56—*Railways Clauses*
See LEVEL CROSSING. [194

12 & 13 Vict. c. 106—*Bankruptcy* - 783
See BANKRUPT TRUSTEE.

—— —— s. 171 - - - - 174
See SET-OFF IN WINDING-UP.

13 & 14 Vict. c. 60—*Trustee Act* - - 783
See BANKRUPT TRUSTEE.

—— —— - - - - - 782
See PERSON OF UNSOUND MIND.

—— —— - - - - - 629
See COSTS IN LUNACY.

15 & 16 Vict. c. 55, s. 1—*Trustee Act* - 167
See PERSON OF UNSOUND MIND. 1.

—— —— s. 10 - - - - 782
See PERSON OF UNSOUND MIND. 2.

15 & 16 Vict. c. 80, s. 42—*Chancery* - 146
See NUISANCE BY PUBLIC BODY.

15 & 16 Vict. c. 83, ss. 6, 9, 10, 23, 24—*Patents*
See PROVISIONAL SPECIFICATION. [577

—— —— s. 38 - - - - 784
See REGISTER OF PROPRIETORS OF PATENTS.

15 & 16 Vict. c. 86, s. 42—*Chancery Improvement*
See WILFUL DEFAULT. [513

—— —— s. 52 - 1, 2, n., 351, 445, 448
See REVIVOR AND SUPPLEMENT. 1—5.

17 & 18 Vict. c. 104, s. 68—*Merchant Shipping*
See MORTGAGE OF SHIP. [136

17 & 18 Vict. c. 125, ss. 8, 15—*Common Law Procedure* - - - - 554
See ENLARGEMENT OF TIME FOR AWARD.

—— —— ss. 60—66 - - - 92
See JUDGMENT CREDITOR.

19 & 20 Vict. c. 97, s. 10—*Trade* - 735
See MERCANTILE LAW AMENDMENT ACT.

19 & 20 Vict. c. 120, ss. 17, 28—*Settled Estates*
See SETTLED ESTATES ACT. [230

24 & 25 Vict. c. 134, s. 94—*Bankruptcy* - 648
See COUNTY COURT JURISDICTION.

—— —— s. 144 - - - - 68
See CHOICE OF ASSIGNEES.

—— —— s. 192 - - - - 58
See ASSENT OF CREDITORS. 1.

—— —— —— - - - - 87
See ASSENT OF CREDITORS. 2.

—— —— ss. 199, 200 - - - 63
See REGISTRATION OF CREDITORS' DEED.

25 & 26 Vict. c. 42—*Rolt's Act* - - 388
See NOISE.

25 & 26 Vict. c. 86, s. 9—*Lunacy* - 653
See WITHDRAWAL OF DEMAND FOR JURY.

25 & 26 Vict. c. 89, s. 75—*Companies* - 58
See ASSENT OF CREDITORS. 1.

STATUTES—*continued.*
25 & 26 Vict. c. 89, ss. 75, 95 - - 174
See SET-OFF IN WINDING-UP.
—— —— s. 115 - - - - 421
See PRODUCTION OF DOCUMENTS.
—— —— s. 158 - - - - 112
See CONTINUING DAMAGES.
—— —— s. 161 - - - - 117
See AMALGAMATION OF COMPANIES. 1.
STOCK EXCHANGE—Custom of - 3, 200, 441
See CUSTOM OF STOCK EXCHANGE. 1—3.
STOCK MORTGAGE—*Offer by Plaintiff—Incapacity to fulfil Offer.*] The Plaintiff transferred stock to the Defendants by way of security for three months. The Defendants, unknown to the Plaintiff, sold the stock, and on his repaying the loan at the end of the three months transferred to him a like amount of stock which they had bought for much less than the sum for which they had sold the Plaintiff's stock. The Plaintiff having discovered that his stock had been sold, filed his bill to charge the Defendants with the profit they had made, offering to retransfer to them the stock they had transferred to him, and he obtained a decree on this footing. On prosecuting the decree, it turned out that the Plaintiff before filing his bill had mortgaged and, before filing his amended bill, had sold the stock which the Defendants had transferred to him, which fact he had not noticed in his amended bill. It being thus impossible for him to retransfer the stock, he presented a Petition asking that he might be at liberty to transfer to the Defendants a like amount of the same stock, and the Vice-Chancellor made an order accordingly:—*Held*, on appeal, that the Petition was inconsistent with the decree, and ought to have been dismissed; and that as the Plaintiff had by his own act made himself incapable of performing the offer in his bill, and not stated the real facts on the pleadings, the bill must also be dismissed. LANGTON *v.* WAITE 402
—— Improper investment of trust fund - 513
See WILFUL DEFAULT.
STOPPAGE OF BANK—Interest on deposits and drafts - - - - 14
See INTEREST ON DEBTS IN WINDING-UP. 1.
STRAIGHTENING PLATES—Fixtures - 630
See FIXTURES.
SUB-CONTRACT—*Vendor and Purchaser—Misrepresentation—Condition as to Acreage—Lien on Deposit — Position of Plaintiff — Jurisdiction — Practice — Parties — Costs of Defendants.*] The owner of an estate agreed to sell it for £250,000, representing it to contain 1530 acres. The purchaser agreed to sell it to a company for £350,000, of which £150,000 was paid to him, £75,000 in cash, and bonds for £75,000, and he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than 1100 acres, and the company, having at the time only £1536 in hand, complained to the purchaser of the deficiency, and he then wrote to the vendor declining to complete. The company afterwards rescinded the contract, and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser and some other Defendants who had agreed to share with him, for a return of the £75,000 and of the bonds:—*Held*, that although the financial position of the company might render it convenient to them to rescind the contract, and though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract as the purchaser was unable to complete with them:—*Held*, that the company were entitled to rescind on the ground of misrepresentation though they might have been able to ascertain the extent of the estate:—*Held*, that the company were entitled to repayment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of the £50,000 repaid to the purchaser, which had been paid into Court.—One of the articles of the contract provided that the estate as to extent of acreage should be taken to be conclusively shewn by certain deeds:—*Held*, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the company from rescinding on the ground of deficiency in acreage.—The same relief was asked against the other Defendants as against the purchaser. One of these Defendants, by his answer, said that the suit was unnecessary and improper; another, that he was improperly made a party to the suit:—*Held*, that they, whether necessary or not, were proper parties to the suit, but that no relief in the shape of repayment could be given against them, and that if they had merely submitted to any order which the Court might make they would have been entitled to their costs, but as they had answered in this manner they would not have their costs. Decree of *Malins*, V.C., reversed. ABERAMAN IRONWORKS *v.* WICKENS - - 101
SUBSCRIBER OF MEMORANDUM—*Company—Winding-up—Contributory—Paid-up Shares allotted to Subscriber for Purchase of Business.*] It is not necessary that a subscriber of the memorandum of association of a company should pay for the shares for which he subscribes in money: it is sufficient that he gives money's worth. The *C.* company was formed for the purpose of purchasing (among other things) the business of the *L.* company, which was intended to be wound up voluntarily, and it was agreed that the consideration should be paid partly in debentures, and partly in paid-up shares of the *C.* company which were to be allotted to the shareholders of the *L.* company. *D.* was a shareholder and director of the *L.* company, and he also signed the memorandum of association of the *C.* company as a subscriber for twenty-five shares. No ordinary shares in the *C.* company were allotted to him, but he received 479 paid-up shares as one of the shareholders of the *L.* company. The shares allotted to the *L.* company were applied for by the liquidators of the *L.* company on behalf of the company, but were allotted to the shareholders individually. The *C.* company was afterwards wound up:—*Held* (reversing the decision of the Master of the Rolls), that the contract by *D.* to take the twenty-five shares for which he subscribed was satisfied by the allotment of the 479 paid-up shares; and that he was not bound to take any ordinary shares. *In re* CHINA STEAMSHIP AND LABUAN COAL COMPANY. DRUMMOND'S CASE - - - 772

SUPERVISION ORDER—Commencement of voluntary winding-up - - - 20
See Transfer of Shares. 1.

SURETY—Release of—Creditors' deed—Covenant not to sue debtor - - - 204
See Release of Surety.

TAXATION OF COSTS — *Practice—Costs of Motions—Application to review Taxation—Ord. of 17th April*, 1867.] An application to review taxation must be made by a summons in Chambers, and cannot be made on motion.—The usual rules as to the costs of motions do not always apply; and where one of the parties is ordered to pay all the costs of a suit up to a given time, the costs of motions made during that time may be included in the costs of the suit.—Order of *James*, V.C., affirmed. Webster *v.* Manby - - 372

2. —— *Accounts—Moderating Bill—Executor—Leave to appeal—Cons. Ord. xl. r.* 25.] A solicitor who was one of the executors of a testator paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge:—*Held*, that although as between solicitor and client the bill was no longer subject to taxation, yet, as against the executor, the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the Taxing Master to state whether any items objected to were fair and proper to be allowed, and to what amount.—The order of the Master of the Rolls affirmed, with variations.—Leave to appeal from a decision in Chambers, without counsel, and without any subsequent hearing in Court, cannot properly be given except by the Court of Appeal. Allen *v.* Jarvis 616

—— Solicitor keeping no proper accounts 43
See Solicitor's Accounts.

TENANT PUR AUTRE VIE - - - 320
See Apportionment.—Tenant for Life and Remainderman.

TIME—Ascertaining amount of debt—Creditors' deed - - - - - 125
See Creditor holding Security. 2.

TRADE FIXTURES - - - - 630
See Fixtures.

TRANSFER OF CAUSE—*Practice—Costs.*] Where a party on insufficient grounds refuses to consent to the transfer of a cause from one Court to another, he will be ordered to pay costs if the notice of motion for the transfer asks for costs. Cocq *v.* Hunasgeria Coffee Company - 415

TRANSFER OF SHARES—*Company — Power of Directors to reject Transfer—Date of Commencement of Voluntary Winding-up—Companies Act*, 1862, *ss.* 22, 85, 130, 151.] The directors of a company have no discretionary power, independently of powers expressly given to them by the articles of association, to refuse to register a transfer which has been *bonâ fide* made.—Therefore where a transferee gave an address at which

TRANSFER OF SHARES—*continued.*

he was only an occasional visitor, it was held that the directors were bound to register the transfer, although the company was at the time in difficulties, and the shares were sold by the transferor in order to get rid of his responsibility.—The decision of the Master of the Rolls reversed.—Where the voluntary winding up of a company is ordered to be continued subject to the supervision of the Court, the winding-up must be deemed to commence from the date of the resolution confirming the winding-up, and not from the presentation of the Petition on which the order is founded. *In re* Smith, Knight, & Co. Weston's Case - 20

2. —— *Contributory—Ultrà Vires—Company a Shareholder—Bankers—Loan upon Security of Shares.*] A banking company *I.*, the articles of which in general terms gave the directors very ample powers of management, advanced money on the deposit of shares in company *A.* The directors becoming alarmed by a judicial opinion that the shares remained within the order and disposition of the depositors, passed a resolution to have the shares transferred into the name of company *I.* or its manager. They were accordingly transferred into the name of company *I.*, the transfers being executed on behalf of company *I.* by an agent, not under the common seal. The company was registered as shareholder, sold some of the shares and received the purchase-money, and received the dividends on the rest. Company *A.* was afterwards ordered to be wound up:—*Held*, that although the acts of ownership exercised by company *I.* over the shares would not have prevented its repudiating them if the transaction had been *ultrà vires*, company *I.* was rightly placed on the list of contributories; for that, although buying the shares of another company as a speculation would have been *ultrà vires*, it was within the powers of the company, as bankers, to advance money on the deposit of shares, and to do all such acts as were reasonable and proper for making the security available:—*Held* also, that the fact of the transfer not being accepted by the company under its seal was immaterial.—The directors of the *I.* company had power from time to time to make by-laws, which were to be entered in a book and signed by three directors. One of the by-laws which they made prohibited the taking a transfer of shares into the name of the company. The resolution above referred to was afterwards passed by six directors, and entered in their minute-book, but was not entered in the book of by-laws, nor signed by three directors:—*Held*, that no third person dealing with the directors could be affected by the by-law, unless it was proved that he knew of it, and that in the present case, if he had known of it he would not have been affected by it, for that the resolution of the directors, who had power to alter it, was sufficient to abrogate it.—Decision of *Stuart*, V.C., affirmed. *In re* Asiatic Banking Corporation. Royal Bank of India's Case 252

—— Custom of *Stock Exchange* - 3, 200, 441
See Custom of Stock Exchange. 1—3.

—— Laches of company - - - 769, n.
See Laches of Company.

—— Laches of contributory - - - 768
See Laches of Contributory.

TRUST—Residence and maintenance - 581
See PRECATORY TRUST.

TRUSTEE—Appointment of—Trustee Act 167, [782, 783
See BANKRUPT TRUSTEE. PERSON OF UNSOUND MIND. 1, 2.

—— Costs—No appeal for - - - 697
See APPEAL FOR COSTS. 2.

—— Executor becoming trustee—Lapse of time [433
See PAYMENT TO ONE EXECUTOR.

—— Improper investments—Unknown *cestuis que trust* - - - - - 280
See IMPROPER INVESTMENT.

—— Mortgage to trustee—Right to foreclose 537
See MORTGAGE TO TRUSTEE.

—— Wilful default—Income—Parties to suit—Improper investments - - 513
See WILFUL DEFAULT.

TRUSTEE ACT, 1850—Bankrupt trustee - 783
See BANKRUPT TRUSTEE.

—— Lunatic mortgagee—Costs of mortgagor 629
See COSTS IN LUNACY.

—— Person of unsound mind - - 782
See PERSON OF UNSOUND MIND. 2.

TRUSTEE ACT, 1852—Person of unsound mind [167, 782
See PERSON OF UNSOUND MIND. 1, 2.

TRUSTS OF CREDITORS' DEED—*Bankruptcy Act*, 1861—*Registered Deed—Concurrent Jurisdiction—Administration of Trusts.*] The Court will not, in ordinary circumstances, entertain a suit for the administration of the trusts of a deed registered under the *Bankruptcy Act*, 1861.—The bill alleged that the Defendants, the trustees of a creditors' deed, had made large profits by supplying the estate with goods while the debtor's business was going on under their superintendence, and that they had made large payments out of the estate in exoneration of the liability which they themselves were under as sureties for the payment of certain instalments by the debtor:—*Held* (reversing the decision of *Stuart*, V.C.), that these circumstances did not take the case out of the general rule, the Court of Bankruptcy having sufficient powers to enable it to deal with such questions.—The question whether the Court ought to exercise its jurisdiction or leave the case to another tribunal may be raised by demurrer where the facts sufficiently appear by the bill; and a Defendant is not bound to wait to the hearing, or raise the question by motion to stay proceedings.—A bill to carry into execution the trusts of a registered deed misstated the time of registration so as to make the registration appear irregular. A plea stating the correct date, averring that the provisions of the Act had been complied with, and submitting that the case ought to be left to the Court of Bankruptcy, was allowed. MARTIN *v.* POWNING - - - - - - 356

ULTRÀ VIRES—Company—Amalgamation 117, [503, 682
See AMALGAMATION OF COMPANIES. 1, 2, 3.

UNDERTAKING AS TO DAMAGES—Interpleader
See AFFIDAVIT OF NO COLLUSION. [347

UNIVERSITY COMMISSIONERS—Statutes of
See COLLEGE. [722

UNSOUND MIND—Person of—Trustee Act [167, 782
See PERSON OF UNSOUND MIND. 1, 2.

UNSTAMPED CREDITORS' DEED—*Evidence—Act of Bankruptcy.*] An assignment of the whole of a debtor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, though unstamped, and not registered under the *Bankruptcy Act*, 1861.—*Ponsford* v. *Walton* (Law Rep. 3 C. P. 167) followed. *Ex parte* SQUIRE. *In re* GOULDWELL - - 47

UNSTAMPED POLICY - - - 611
See MUTUAL INSURANCE SOCIETY.

USAGE—Charity—College at University - 722
See COLLEGE.

VALIDITY OF CREDITORS' DEED—Order for registration not conclusive - - 63
See REGISTRATION OF CREDITORS' DEED.

VENDOR AND PURCHASER—Contract by agent—Appointment by parol - - 548
See AGENT APPOINTED BY PAROL.

—— Doubtful title - - - - 230
See SETTLED ESTATES ACT.

—— Sub-contract - - - - 101
See SUB-CONTRACT.

VESTING ORDER—Lunatic mortgagee—Costs of mortgagor - - - 629
See COSTS IN LUNACY.

VOLUNTARY WINDING UP—Commencement of—Supervision order - - 20
See TRANSFER OF SHARES. 1.

WAIVER—Conditional acceptance of shares 184
See ACCEPTANCE OF SHARES. 1.

WARD OF COURT—*Marriage after Twenty-one—Settlement—Jurisdiction.*] A ward of Court entitled to a small fund in Court to her separate use, married on the day after she came of age. The Master of the Rolls ordered the fund to be settled; but on appeal it was ordered to be transferred to her. WHITE *v.* HERRICK - - 345

"WARREN OF CONIES"—*Grant—Words of Description.*] The grant of a "warren" by a person who is both owner of the soil and has a right of free warren in it may pass an estate in the soil if the context of the instrument shows the intention to be such, but that is not its *primâ facie* construction. *Co. Litt.* 5 b (*b.*) explained. By a grant from the Duchy of *Cornwall*, in 1799, certain closes of land, and "all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever, in *Bromby*, and all that lodge or house thereupon built, commonly called *Bromby Lodge;* and all that warren of conies in *R.*, both which said warrens of conies are known by the name of *Bromby* warren, and extend themselves in and over the wastes of *Bromby*, &c.," were granted to a person from whom the Plaintiff claimed. The duchy was entitled to the soil of the wastes, and to a right of free warren in them:—*Held*, that the context did not enlarge the meaning of the words "warren of conies" so as to make it pass anything more than a right to the conies, and whatever was fairly incident to, or necessary for, the preserving and making profit out of them. Decree of the Master of the Rolls affirmed. EARL BEAUCHAMP *v.* WINN - - - - 562

WAY OF NECESSITY—*Prescription—Easement—Landlord and Tenant.*] The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made over an outer close which belongs to the same landlord. —But the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord.—Decree of *Stuart*, V.C., reversed. Gayford *v.* Moffatt - 133

WEIGHING MACHINES—Fixtures - - 630
See Fixtures.

WILFUL DEFAULT—*Trustee—Parties to Suit for Administration—Tenant for Life and Remainderman—Decree for Wilful Default as to Income*—15 & 16 *Vict. c.* 86, *s.* 42—*Improper Investments—Stock Mortgage—Trustee making Profit by his Office—Solicitor.*] A bill to administer the estate of a testator, charging the trustee with wilful default, was filed by a person interested in the estate in remainder, the tenants for life not being parties to the suit:—*Held*, that the decree must be confined to an account of wilful default as to the capital, and that no relief could be obtained with respect to the income of the estate.—The effect of the 42nd section of the 15 & 16 Vict. c. 86, is at most to place persons served with notice of the decree on the same footing as if they were Defendants: they cannot be treated as co-Plaintiffs, and no inquiries can be obtained in such a suit for their benefit that could not have been obtained between co-Defendants.—A trustee, who was a solicitor, sold out stock forming part of the trust estate and invested it on mortgage. He acted in the transaction as solicitor for the mortgagor as well as for the trust estate, but made no charge against the trust estate for his services, being paid for them by the mortgagor. He also derived some profit as a solicitor in consequence of the employment of part of the mortgaged estate for building purposes:—*Held*, that the Plaintiff could not charge him with the profit thus made, as having been made by the employment of the trust estate in his business.—A trustee sold a sum of consols, forming part of the trust estate, and invested the proceeds in a stock mortgage:—*Held*, that this was an improper investment.—The decree of *Stuart*, V.C., varied. Whitney *v.* Smith - - - - 513

WILL—Appointment by gift of legacies - 587
See Appointment by Gift of Legacies.

—— Gift to college - - - - 722
See College.

—— "Money"—Proceeds of policy - 574
See "Money."

WILL—*continued.*

—— Next of kin according to the statute, exclusive of A. - - - 300
See "Next of Kin, exclusive of A."

—— Precatory trust - - - - 581
See Precatory Trust.

WINDING-UP — Bankrupt shareholder — Discharge before winding-up - - 274
See Bankrupt Shareholder.

—— Forfeited shares - - - - 266
See Forfeited Shares.

—— Interest on debts - - 14, 643
See Interest on Debts in Winding-up. 1, 2.

—— Laches of company - - 769, n.
See Laches of Company.

—— Laches of contributory — Transferee dead without representative - - 768
See Laches of Contributory.

—— Misrepresentation in prospectus - 497
See Misrepresentation in Prospectus.

—— Production of documents - - 421
See Production of Documents.

—— Production of documents — Solicitor's lien
See Solicitor's Lien. 1, 2. [215, 657

—— Proof—Debts carrying interest 14, 643
See Interest on Debts in Winding-up. 1, 2.

—— Proof for damages - - - 112
See Continuing Damages.

—— Securities for bills of exchange—Doctrine of *Ex parte Waring* (19 Ves. 345) - 423
See Securities for Bills of Exchange.

—— Set-off—Bankrupt contributory - 174
See Set-off in Winding-up.

—— Subscriber of memorandum—Paid-up shares
See Subscriber of Memorandum. [772

—— Voluntary—Commencement of - 20
See Transfer of Shares. 1.

WITHDRAWAL OF DEMAND FOR JURY — *Lunacy*—25 & 26 *Vict. c.* 86, *s.* 9—*Practice.*] Practice as to withdrawing demand for a jury on an inquiry as to insanity. *In re* Crompe. 653

WORDS—"Money" - - - - 574
See "Money."

—— "Next of kin according to the statute, exclusive of A." - - - - 300
See "Next of Kin, exclusive of A."

—— "Profits in hand" - - - 475
See Misconduct of Directors. 2.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

BIBL. LONDIN. UNIV.